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IN THE

Supreme Court of the United States

October Term, 1948.

No. 107.

AARON TURNER,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENT AND APPENDIX.

COLBERT C. McCLAIN,
Assistant District Attorney,
JOHN H. MAURER,
District Attorney,
Philadelphia County, Pennsylvania,
666 City Hall,
Philadelphia 7, Pa.,
Attorneys for Respondent.

Martin & Lyle, 817 Weightman Bldg., Phila. 2, Pa.

INDEX OF BRIEF

	PAGE
Respondent's Statement of the Case	1
Summary of Argument	6
Argument	6
I. Admissions of the Confessions in Evidence	7
II. Testimony of Petitioner before a Committing Magistrate	11
III. Enactment of the Crime	16
IV. As to being held five days before Preliminary Hearing	17
V. As to the Federal Law and 14th Amendments to the Constitution of the United States	21
Due Process	21
VI. With reference to Petitioner's alleged request for Counsel	35
VII. Further reference to Due Process of Law under the 14th Amendment of the Constitution of the United States	38
A consideration of recent Federal Supreme Court decisions and their application to Petitioner's case	41
Recent Federal Court decisions on the Admissibility of Confessions	44
The Inherent Coercion (Ashcraft Case) Rule	44

PAGE

Inconsistent Defenses regarding Evidence of a Confession 45

The Delayed Arraignment (McNabb Case) Rule 47

Conclusion ..... 49.

TABLE OF CASES CITED

Ashcraft v. Tenn., 322 U. S. 143 (1944) 41, 44

Brown v. Miss., 297 U. S. 278 (1936) 42

Chambers v. Fla., 309 U. S. 227 42

Com. v. Ballon, 229 Pa. 323 7

Com. v. Brooks, 355 Pa. 551 7

Com. v. Carelli, 281 Pa. 602 7

Com. v. Clark, 130 Pa. 641 (1889) 13

Com. v. Jones, 341 Pa. 541 (1941) 19

Com. v. Lawrence, 282 Pa. 128 7

Com. v. Oreszak, 328 Pa. 65 7

Com. v. Rose, 327 Pa. 220 7

Com. v. Spardute, 278 Pa. 37 (1923) 14

Com. v. Sterling, 314 Pa. 76 (1934) 9

Commonwealth v. Szachewicz, 303 Pa. 410 16

Com. v. Wooding, 355 Pr. 555 7

Com., ex rel., Shaw v. Smith, 147 Sup. 423 ..... 24, 25

Com., ex rel., Uveges, Appellant v. Ashe, 161 Pa. Sup. 58 25

Frank v. Mangum, 237 U. S. 309, 326, 35 S. Ct. 582, 59 L. Ed. 969 26

Franklin v. South Carolina, 218 U. S. 161 27

Garland v. Washington, 232 U. S. 642 27

Haley v. Ohio, 68 S. Ct. 302 ..... 43, 44

PAGE

Haley v. Ohio, 332 U. S. 596 39

Krug, 79 Fed. 308 27

Lee v. Miss., 68 S. Ct. 300 (1948) 42, 46
Lisenba v. California, 314 U. S. 219 ..... 6, 22, 41, 43
Lyons v. Oklahoma, 322 U. S. 596 ..... 6, 41

Malenski, et al. v. N. Y., 324 U. S. 401 43
Maxwell v. Dow, 176 U. S. 581 27
McNabb v. U. S., 318 U. S. 332 ..... 38, 43, 47
Missouri v. Lewis, 101 U. S. 22, 31 38

Pico v. U. S., 228 U. S. 225 27

Straudder v. West Virginia, 100 U. S. 303 26

Townsend v. Burke, Warden, U. S. Supreme Court, No. 542, October Term, 1947 38

United States v. Mitchell, 322 U. S. 65 ..... 6, 31, 34, 43, 44

Walker v. Sauvinet, 92 U. S. 90 26
Wan v. United States, 266 U. S. 1 41

TEXT BOOKS AND LEGAL JOURNALS

Journal of Criminal Law and Criminology, including the American Journal of Police Science, Vol. XXXVIII, No. 2 of July-August, 1947 27

Journal of Criminal Law and Criminology, including the American Journal of Police Science, Vol. XXXVIII, No. 6, March-April, 1948 44

Texas Law Review, April 1946, Volume XXIV, No. 3 22

Underhill on Criminal Evidence, 2d ed. Section 132... 14

TABLE OF CONTENTS

INDEX OF APPENDIX

	PAGE
Testimony in re: Commonwealth v. Clarence Lofton	1a

COMMONWEALTH'S:	D.	C.	RE D.	RE C.
Detective Lieutenant James A. Kelly	8a	13a	14a	15a

DEFENDANT'S:				
Clarence Lofton	17a	25a		

Commonwealth's Exhibit (Proceeding before Magistrate Edward Williams, Central Police Court)	37a
Lieutenant James Kelly	38a
Jasper Johnson, Co-Defendant	39a
Clarence Lofton, Co-Defendant	42a
Aaron Turner, Co-Defendant	42a
Clarence Lofton (recalled)	43a
Jasper Johnson (recalled)	44a
Discussion between Lewis, J. and Defendant, Clarence Lofton	45a

RESPONDENT'S STATEMENT OF THE CASE.

The petitioner, Aaron Turner, alias "Treetop", twenty-six years of age, was characterized by the trial judge, his Honor Frank Smith, who observed him and listened to his testimony, as a "smart, clever individual" (R. 276) and not a "poor Negro of a low degree of intelligence". (R. 276) or "the poor, Moronic type of Negro similar to those accused in some other cases. He is a clever, knowing criminal" (R. 282).

About two days before the murders and robberies he reconnoitered or observed the premises of the Ace Broom Factory at 355-57 North 2nd Street, Philadelphia, Pa. Thereafter, on Saturday, afternoon, December 15, 1945, about 5 o'clock, after having conspired with Jasper Johnson, nineteen years of age, alias "James Johnson", alias "Fats", alias "Playboy," and one Clarence Lofton, thirty-four years of age, to commit a robbery, they went to this store and factory when the wholesale district in which they are located is quiet, and this petitioner, armed with a sash weight or pipe, entered the premises through the front door just ahead of Jasper Johnson. Clarence Lofton stood outside and acted as a lookout.

As they entered they met Frank Endres, white, about sixty-two years of age, and petitioner struck him on the head with the sash weight or pipe, knocking him to the floor causing injuries from which he died at the Hahnemann Hospital two days later, December 17, 1945. While he was lying on the floor of the front office of the Ace Broom Factory, Jasper Johnson went through his pockets and extracted therefrom about $175.00. The noise which had been occasioned by the killing of Endres caused Charles Simmons, white, about sixty-four years of age, the proprietor of the Ace Broom Factory, to run into the front room from the rear, and as he did, petitioner hit him with the sash weight or

pipe, knocking him to the floor, and causing injuries from which he died in the Hahnemann Hospital seven days later, December 22, 1945. While Charles Simmons was lying upon the floor, petitioner robbed him of an unknown sum estimated to be from one hundred to several hundreds of dollars. Petitioner and Johnson thereupon ran out, joined the lookout, Clarence Lofton, and proceeded to a barroom at 8th and Callowhill Streets, where the three had several drinks and divided the money.

The lethal blows were inflicted by Petitioner upon Charles Simmons, as well as those upon his employe, Frank Endres, within a few moments of each other, and in the same surrounding circumstances, and they were both robbed.

All three men gave comprehensive and detailed statements of everything each one of them did in the commission of the robberies wherein these two men were killed. The statements were all made in the presence of the others, and each one was signed by the others as witnesses. In Jasper Johnson's statement which petitioner signed and affirmed he is quoted as saying "One of the fellows was no trouble, but the largest one he had to give a hell of a blow" (R. 46).

As a result of police investigation, Clarence Lofton was apprehended on May 24, 1946. This petitioner was implicated and thereafter arrested on June 3, 1946. On the same day Jasper Johnson was apprehended by the police, and their written confessions were started on June 7, 1946, and signed on June 8, 1946.

During the taking of the statements, or just after they had been written down stenographically, the defendants were brought before Magistrate Edward Williams in the Central Station for a hearing. They were all present when Lieut. James Kelly, Chief of the Homicide Division of the Philadelphia Police, testified concerning the commission of the crimes and told Magistrate Williams that they had made statements concerning their participation therein. D. Barlow Burke, Esq., Assistant District Attorney, was present on behalf of the Commonwealth, and he thereupon

addressed the defendants as follows (R. 76). (Appendix, 38a):

"MR. BURKE: Do any of you men want to say anything this morning? I want to warn you in advance that anything you say may be used against you in court, and that you don't have to say anything if you don't want to. I understand, however, that you have made statements to the officers and signed those statements. Jasper Johnson, you have made a signed statement to the officers?

JASPER JOHNSON: Yes, sir."

Jasper Johnson was voluntarily sworn before the Magistrate, and gave a complete statement in answers to questions put to him concerning his participation in this crime, generally about the same as is contained in his statement given to the Police (Appendix, 39a).

Next, Clarence Lofton, co-defendant, was voluntarily sworn and he was told by Mr. Burke that anything he said may be used against him and that he did not have to speak unless he wanted to. He corroborated what Johnson had said (Appendix, 42a). The Court Stenographer, David F. Houlihan, Jr., was not available at the trial of this petitioner because of illness, but Lieutenant Kelly testified from his recollection as to what was said before the Magistrate, upon interrogation by the Assistant District Attorney trying the case, who had the stenographer's transcript of the proceedings before him. At the later trial of Jasper Johnson on January 27, 1947, the court stenographer was available and testified, and for the information of this court, a transcript of the hearing before Magistrate Edward Williams is contained in the evidence at the trial of Clarence Lofton when he pleaded guilty generally to murder (Appendix, 37a to this brief). This was all in open court before a duly constituted magistrate of the City and County of Philadelphia.

Thereupon, petitioner was sworn, and having previously been warned, he said that he did not want to add anything, but he corroborated the testimony of the two previous co-defendants, Jasper Johnson and Clarence Lofton, that what they said was true (Appendix, 42a).

At his trial, petitioner denied that the statement he had given the police, or the fact that he had signed those of his co-defendants, was a voluntary act upon his part, and he averred that because of police brutality, he was compelled not only to sign his statement and sign the other statements as a witness, but was likewise compelled to testify before the magistrate as he did. The authorities positively and unequivocally denied his allegations of mistreatment and coercion and swore that when confronted with his inconsistent statements made at first, and with those of his confederates, he finally told the truth. They also swore that he was never subjected to any long, continuous, uninterrupted interrogation. This question of fact was submitted to the jury for decision, upon instructions of the trial judge, consistent with the long established decisions and the law of Pennsylvania (R. 195, 196, 197, 198).

Petitioner was convicted of the murder of Frank Endres, an employe of the Ace Broom factory in the first degree, before Judge Frank Smith and a Jury, who fixed the penalty at death. A motion for a new trial was argued before the Honorable Frank Smith, the trial judge, the Honorable Harry S. McDevitt, and the Honorable Joseph Sloane. Judge Smith and Judge McDevitt concurred in refusing a new trial and Judge Smith filed an opinion February 11, 1947 (R. 264). Judgment was pronounced upon the verdict.

On November 7, 1947, just before argument on this petitioner's appeal to the Supreme Court of Pennsylvania, after having sat in the case of Clarence Lofton, the lookout, who pleaded guilty generally to murder on January 31, 1947, and having heard his testimony and concurring in the judgment that it was murder in the first degree with a sentence of

life imprisonment, Judge Sloane belatedly filed a dissenting opinion in this petitioner's matter (R. 293). The testimony in Lofton's trial is attached to this brief as an appendix.

Jasper Johnson, alias James Jackson, alias "Fats", alias "Playboy", was tried before His Honor Judge Edwin O. Lewis and a Jury on January 27, 1947, and was likewise convicted in the first degree, and given the death penalty by the Jury. A Motion for a new trial in his case has been refused by the Court of Oyer and Terminer and an appeal is pending in the Supreme Court of Pennsylvania.

The appeal of this petitioner, Aaron Turner, was argued before the Supreme Court of the State of Pennsylvania on November 24, 1947, before Maxey, C. J., Linn, Stern, Patterson, Stearne and Jones, J.J. An opinion was filed by Mr. Chief Justice Maxey March 23, 1948, for the Court (R. 309), Mr. Justice Jones concurring in the judgment.

Petitioner had been in metropolitan Philadelphia from 1939, earning a dubious living, a smart, clever individual who is so tall that he is known as "Treetop" and whose ability to manipulate crooked dice was demonstrated by him a number of times to the authorities during his incarceration. Lt. James Kelly characterized him as follows at the trial of Clarence Lofton (Appendix, 16a):

> "The investigation showed that Aaron Turner was the dominant head of practically all of them, and this particular weapon that he used in this case was a constant companion to him. He was quite a gambler and quite a gambling cheat, and he carried this what they describe as a sash weight at all times."

SUMMARY OF ARGUMENT.

When the allegation of Petitioner, made at the time of his trial in Court, as to the coercive character of his confession and those of his accomplices, is absolutely and completely denied, and it is asserted by Respondent Commonwealth's witnesses that the confessions were voluntary, is it a question of *fact* for the Jury to decide, under proper instructions from the Trial Judge (and not a question of law) first, whether the confessions were voluntary in character; and, second, if true, whether a verdict of guilty can be based thereon?

(Affirmed in the Commonwealth of Pennsylvania Courts.)

LISENBA v. CALIFORNIA, 314 U. S. 219;
UNITED STATES v. MITCHELL, 322 U. S. 65;
LYONS v. OKLAHOMA, 322 U. S. 596.

ARGUMENT.

Under the law of the State of Pennsylvania, Edwin P. Rome, Esq., and Clinton Budd Palmer, Esq., were appointed as attorneys for the petitioner, as an indigent defendant (R. 313, footnote 2), and he had a fair and impartial trial before a jury which these counsellors participated in selecting, having under Pennsylvania Law the right to twenty-one

peremptory challenges, and as many more for cause as they could show. These attorneys were paid by the Commonwealth.

I.

ADMISSION OF THE CONFESSIONS IN EVIDENCE.

The petitioner gave a complete and accurate statement of the crimes (R. 35) with such details as only the perpetrator thereof would know. His statement was signed by Jasper Johnson as a witness and by his other accomplice Clarence Lofton (R. 41). In turn, Aaron Turner, this petitioner, signed the statements of his accomplices, Jasper Johnson (R. 42) and Clarence Lofton (R. 48) as a witness. Under the law of the State of Pennsylvania, all these statements were the same as if he had made them himself.

In COM. v. ORESZAK, 328 Pa. 65, Mr. Chief Justice Kephart said on page 68 thereof:

> "When the accused acknowledges the truth of the statements of his accomplices, they become admissible not as evidence or statements of his accomplices, but as his own admission of the facts they relate."
>
> COM. v. BALLON, 229 Pa. 323;
> COM. v. CARELLI, 281 Pa. 602;
> COM. v. LAWRENCE, 282 Pa. 128;
> COM. v. ROSE, 327 Pa. 220;
> COM. v. WOODING, 355 Pa. 555.

In COM. v. BROOKS, 355 Pa. 551, Mr. Justice Stern said at page 554:

> "There was admitted in evidence not only the signed confession of defendant himself but also that of Wood-

ing. It is objected that this violated the constitutional right of the accused to meet the witnesses face to face. Not only, however, was Wooding's confession made in defendant's presence, but, when reduced to writing, was read and signed by him as a witness without his denying or repudiating any of the statements it contained with respect to his own complicity in the crimes. For the purpose of showing such tacit acquiescence on defendant's part Wooding's confession was clearly admissible."

Petitioner was the man who wielded the sash weight or pipe and who killed two men for the purpose of robbing them, himself robbing his second victim of a sum of money which he did not disclose to his accomplices, and participating in a share of the proceeds of the robbery of the first man. Chief Justice Maxey in his opinion for the Court affirming the conviction said (R. 313):

"Anyone with experience in the administration of criminal law who reads the answers Turner made to the questions put to him will readily conclude that the statements he made to the officers were not those of a coerced or scared witness but that they were the statements of a man who had committed a murder and whose recital of its details was clear and explicit. The teller of the gruesome story of this double murder was obviously drawing on his memory and not on a fear-fired imagination. His narrative dove-tailed so accurately with the physical facts surrounding the crime and with the story told by his accomplices that there can be no reasonable doubt of the story's truthfulness."

The conviction of murder in the first degree and the fixing of the penalty at death by the jury was amply justified by the evidence. Disappointment at a just verdict and

proper judgment does not of itself raise a constitutional question of law.

Mr. Justice Kephart aptly said in COM. v. STERLING, 314 Pa. 76 (1934) at page 78:

> "The death penalty has been fixed by the Legislature in the belief that it not only protects society from the antisocial actions of the particular person condemned and punishes him as well, but that it is, in its imposition in each case, a deterrent to others who may contemplate injury to society."

To determine whether or not the confessions were voluntary the trial Court in its charge (R. 196, 197, 198) said as follows:

> "When it comes to consideration of the statements of the alleged confederates, or accomplices, as they might be called, it is your duty to carefully study the alleged confessions. Study them with care and caution, since these men have already admitted, themselves, being involved in murder. If you believe the alleged confessions or admissions of the accomplices, you must first find they were freely given, without promise, coercion, or inducement. If you find the confessions to be true, you may convict him upon the confession; but it is best to have it corroborated by material facts which indicate its truthfulness.
>
> "The police have presented the alleged confession of the defendant himself. These confessions are intertwined, and in examining the evidence you have the right to determine how each and every one was reached by the defendant and the two other men, Johnson and Lofton.
>
> "The law is quite clear about confessions. The law says that before a confession can be admitted the corpus delicti must have been proved. That means that the killing must be proved, and the surrounding cir-

cumstances must indicate that he has been killed unlawfully and feloniously at the hands of another. Then, before the confession may be admitted in evidence, the jury must be satisfied beyond a reasonable doubt that the confession has been a free and voluntary one, not induced by fear, coercion, or promise held out, or inducement held out to the defendant. You must first find that the confession was a voluntary statement made by the defendant of his own free will. That seems to me to be the crux of this case.

"For the same reason, if you do not believe this confession was a free and voluntary one, then you have no right to consider it in the evidence. If you believe beyond a reasonable doubt it is a free and voluntary confession, not induced by fear, coercion or inducement held out, or by threats made, then you may accept the confession in your consideration of all the evidence.

"There is another question of law involved, and that has to do with the alleged confession of the so-called confederates. You may remember it is apparent these alleged confessions were made either the 8th of June or later. The police, you may recall, testified they were made the 8th of June, and the defendant has testified they were made two or three days later. Nevertheless, my recollection is—and I do not think there is any doubt about this—that all the confessions were signed by each of the three who made them, and when each made a confession involving the other one, his confession was signed not only by the one making the confession, but was also signed by the others. This defendant not only signed his own alleged confession but also signed the alleged confession of Johnson and the alleged confession of Lofton at the time they were made. The law says a statement made in the presence of a defendant may be put in evidence against him only when his silence under the circumstances means

his assent to the correctness of the statement. This man put his name on each of the other two statements, where the other two men, Johnsor and Lofton, made their alleged confessions. There is no evidence, that I know of, that he said, 'These things are untrue that these men have said about me,' but he did in fact attach his name to the said statements. That is an inference that the statements are true.

"Statements generally may be offered in evidence and that is why I admitted it; but it has no effect as an admission except against the party who makes it, unless it was read to the defendant and he admitted its accuracy and truth. He put his name on each confession, and it is for the jury to determine whether there is from that the inference that those statements made in his presence, to which he put his signature, indicated his approval and correctness of the statements."

To accept the uncorroborated statements of the Petitioner as to alleged brutality as verity, and to declare as a matter of law, based upon them alone, that his confession and those of his confederates and accomplices were coerced, would be placing a premium upon perjury.

II.

TESTIMONY OF PETITIONER BEFORE A COMMITTING MAGISTRATE.

At or about the time the confessions were signed by the co-defendants, a hearing was had before Magistrate Edward Williams in the Central Station, City Hall, Philadelphia. D. Barlow Burke, Esq., was present as Assistant District Attorney. David F. Houlihan, Jr., the court stenog-

rapher, was ill at the time of this petitioner's trial on September 25, 1946, and unavailable. For this reason Lieut. Kelly was asked as to his recollection of what transpired before the Magistrate. The court stenographer was present on Monday, January 27, 1947 at the trial of Jasper Johnson, alias James Jackson, alias "Fats," alias "Playboy," and then he identified his notes and the transcript. It is also part of the case against Clarence Lofton and is found at page 37a of the appendix to this brief.

The interrogation of Lieut. Kelly as to what this Petitioner said at the time of the hearing before the committing magistrate was admitted by the trial judge, and will be found in the record (R. 76 to 86, inclusive).

All three defendants had signed or were about to sign all of the written confessions which were rather lengthy, and were being transcribed by a police stenographer. After Lieut. Kelly testified, D. Barlow Burke, Assistant District Attorney, stated to the three defendants before the magistrate (R. 76 and 38a of Appendix):

> "Do any of you men want to say anything this morning? I warn you in advance that anything you say may be used against you in court and that you don't have to say anything if you don't want to. I understand, however, that you have made statements to the officers and signed those statements. Jasper Johnson, you have made a signed statement to the officers? Jasper Johnson: Yes, sir. Mr. Burke: Do you want to say anything this morning? Jasper Johnson: Yes, sir."

Whereupon Jasper Johnson and Clarence Lofton detailed their part in the homicide and robbery of the two men. Aaron Turner, this petitioner, heard that testimony. Then he was voluntarily sworn and testified as follows (R. 84 and 42a and 43a of Appendix):

"Q. Do you want to say anything to his Honor?
A. No, sir.
Q. Can you add anything?
A. No, sir.
Q. You don't want to add anything? Do you agree with the testimony that these two men have given in court?
A. Yes, sir.
Q. Do you corroborate their testimony?
A. Yes, sir.
Q. You say that it's true?
A. Yes.
Q. You are not denying anything that they said?
A. No, sir.
Q. How much money did you get?
A. I don't know.
Q. About how much?
A. I would say about $175.
Q. Did you divide up with the others? Was that $175 that which you yourself got out of the thing?
A. Yes, sir.
Q. Was that in addition to the $50 that one got and the $175 the other got?
A. No, sir.
Q. That is your share?
A. Yes, sir.
Q. You got $175 yourself?
A. Yes, sir.'"

In the case of COM. v. CLARK, 130 Pa. 641 (1889), Mr. Chief Justice Paxson said at page 650:

"The law is always tender and merciful to a defendant. It will protect him against the use of a confession drawn from him by holding out inducements to make it; but when a criminal wants to ease his mind by a voluntary confession, it would be a weak senti-

mentalism to interfere with his doing so. Nor do I see that its force as a statement is impaired by the fact that the justice of the peace administered an oath to him."

And further on page 651:

"The fact must not be overlooked that a defendant in a homicide case may now take the stand, and be sworn as a witness on his own behalf. There would seem to be no good reason why he may not of his own motion go before a magistrate, and make a voluntary statement under oath. It is quite a different matter where the oath is administered against his will."

In the case of COM. v. SPARDUTE, 278 Pa. 37 (1923), on page 47 thereof, Mr. Justice Schaffer said:

"It did not invalidate his confession that he was sworn.

'The mere fact that the defendant was under arrest, or was in charge of armed police officers when he made his confession, will not make a confession involuntary.'"

In UNDERHILL on CRIMINAL EVIDENCE, 2d ed. Section 132, page 256, he has the following to say upon the fact that an accused person may be sworn before a magistrate:

"The preliminary examination of an accused person has for its main objects the perpetuation of the testimony against him, the ascertainment if he shall be held to await the action of the Grand Jury, and if so whether he shall be admitted to bail. When the accused is brought before the justice the latter must, as soon as possible, examine the witnesses for and against him under oath. The accused must be present when

this evidence is received, though the examining magistrate may exclude all witnesses except the one who is testifying. The accused may be sworn at *his own request* (Italics ours), and examined as a witness in his own behalf, under the restrictions which apply to the examination of defendants in criminal trials. He should, in justice to himself, be informed of his right to refrain from testifying. He should be told that he need not answer any questions and that his silence or expressed refusal to answer incriminating questions cannot be used against him on his trial. After thus having been warned anything he may say in the nature of a confession and which is not under oath, may be used against him on his trial. And where, having been instructed as to his right to remain silent at the preliminary examination if he so desires, he voluntarily goes on the witness stand and, under oath, testifies to his version of the facts in the case, anything he may say of an incriminating nature under such circumstances, though he is under oath, may be used against him subsequently as his confession."

These citations dispose of any contention of the petitioner that it was not right and proper to have presented to the court and jury what Johnson, Lofton and Turner said after being sworn before Magistrate Williams, and after all three were fully warned that anything said at the time under oath would be used at the time of trial in court. This Petitioner corroborated Johnson and Lofton, and at no time was a reluctant witness.

III.

RE-ENACTMENT OF THE CRIME.

The confessions had been signed on June 8, 1946, and after the hearing before the committing magistrate, the accused were taken to the premises 355-57 North 2nd Street, and there Clarence Lofton and Jasper Johnson, in the presence of this petitioner re-enacted the crime. Petitioner when asked if he had anything to say, said he did not wish to say anything (R. 94 to 104, inclusive). This was ample corroboration of the confessions theretofore signed by each defendant, and the proceedings before the magistrate.

COMMONWEALTH v. SZACHEWICZ, 303 Pa. 410.

In further corroboration of the confession of this petitioner, Jasper Johnson, in his confession said (R. 45) in part:

> "The fellow was on the floor scuffling and trying to get up. I runs in his pocket and pulls out a wallet out of the hip pocket. I look in the wallet sees money and takes the money out. I slings the wallet somewheres in the building, but I don't know where. I looks around to see Treetop and the other man. He was on the floor and Tree was over him. He had done slugged him."

Mr. Spirdon Kondratenko testified (R. 104-105) that he had found a wallet and key in the coal box of the Ace Broom Factory, 355-57 North 2nd Street shortly after December 15, 1945, the date of the happening of this crime, and gave them to Detective Fisher on January 21, 1946. This coal box was located in the front of the building near the door through which the defendants were said to have entered

and departed. The pocketbook was identified by Mrs. Simmons, the widow of one of the men killed, as being his property, and the key was identified by Mrs. Endres, the widow of the other slain man as being the key to their residence (R. 108).

IV.

AS TO ACCUSED BEING HELD FIVE DAYS BEFORE PRELIMINARY HEARING.

This question has been answered by the trial judge, his Honor Frank Smith, in his opinion refusing a new trial, in which Judge Harry S. McDevitt concurred (R. 266, 267, 268, 269), and therein he said:

> "The evidence shows by inference at least that the defendant was placed in custody by the police without a warrant first having been issued, because they had only reasonable grounds to believe that he might be involved in two murders, and that they desired to question him and others. We are aware of the fact that it is improper for an innocent man to be apprehended and detained in the custody of the police, and that the courts in all jurisdictions condemn such practice even to the point where the officers are held liable in damages. But it is also true that the law favors honest efforts to bring the guilty to justice. In McCarthy v. DeArmit, 99 Pa. 63, 71 (1881), it was said:
>
> > 'The fact of felony, and reason for suspecting a particular person, justify his arrest. But a peace officer, who arrests one upon reasonable suspicion of felony will be excused, even though it appear afterwards that in fact no felony had been committed. It may be expected that a felon will flee from justice, if an opportunity is afforded him, and that if he

knows he is suspected he will do what may be in his power to obliterate the evidences of his crime. In these circumstances are found forcible reasons for prompt action in his arrest. The public safety, and due apprehension of criminals charged with heinous crimes, imperiously require that such arrests should be made without warrant by officers of the law. Many an innocent man has been and may be taken up on suspicion; but the mischief and inconvenience to the public, in this point of view, is comparatively nothing; it is of great consequence to the police of the country. Burns v. Erbe, supra; Rohan v. Sawin, 5 Cush. 281; Wakely v. Hart, supra; Cooley on Torts, 174.'

"Common sense tells us that in cases of brutal, vicious murder where the victim is dead and the murderer is the only living person who was present at the scene of the crime, all such crimes would go unpunished if the police officers were entirely hampered in their efforts to procure information upon which to base a charge of homicide. In many such cases, it is only by patient, determined, and searching police work that the officers may get sufficient information upon which to base a reasonable suspicion that a certain person was involved in the crime. Society demands that this be so. It is clear that in matters based only upon a reasonable suspicion of guilt that the police could not present sufficient evidence to enable a magistrate to hold a person for the Grand Jury, and that if this was the only course that the police could pursue, many guilty persons could bring about their discharge on a writ of habeas corpus, and thus be forewarned by the information then had by the police. In this manner a vicious killer would have to be released on a society otherwise unable to cope with him. It seems to us as long as the actions of the police are those which would have the approval of sober-minded, reasonable

men, that they should be permitted to make such proper investigation to solicit the truth, so that the man in custody might either be discharged or brought before a magistrate as soon as is reasonably practical for a hearing. *The question of whether the detention of the accused be for an hour, or a day, or for five days, is not the deciding factor since inherently any detention for any period of time, no matter how short, may be classed as coercive.* (Italics ours.) It is contended by the defense that any detention beyond a period of 36 hours is prima facie evidence of coercion. It is our opinion that the period of time may be taken into consideration in determining the question of whether the statement of the person detained is a free and voluntary confession or whether the period of detention was material in forcing an involuntary statement from him. It is one of the elements to be considered, and in reaching a determination of this question, the judge and the jury having the defendant before them are best able to decide whether or not he is of a mental and physical type to be or not to be affected alone by the period of detention. No one is in such a good position as to determine the effects of a detention as the Court and jury before whom he appeared and was tried. They had all of the witnesses, including the defendant, before them and they are best able to judge the effect on the prisoner of what occurred before he made his statement to the police: Com. v. Aston, 227 Pa. 112; Com. v. Johnson, 162 Pa. 63; Com. v. Johnson, 217 Pa. 77; Com. v. Jones, 297 Pa. 326, 334.

"*After a study of the defendant as he appeared in Court* (Italics ours), and a consideration of the testimony, it is our opinion that his detention without more is not sufficient for the granting of a new trial"

Particular reference is made to the case of the COM. v. JONES, 341 Pa. 541 (1941), and there Mr. Justice Patterson said at pages 547, 548 and 549, as follows:

"It is urged that the written statements made and signed by appellant on June 7, 1940, and June 17, 1940, in each of which he states that it is made voluntarily and with knowledge that it may be used against him in court, should not have been admitted because he was being held in custody at the time and was denied the right to procure an attorney, because he was accused of lying and those having him in charge assumed his guilt during prolonged questionings, because of the application of a lie detector during the interrogations, and because the statements had been forced from him by physical abuse and torture. *'The mere fact that the defendant was under arrest, or was in the charge of armed police officers when he made his confession, will not make a confession involuntary:'* Com. v. Spardute, 278 Pa. 37, 47. See also Com. v. James, 294 Pa. 156, 161; Com. v. Cavalier, 284 Pa. 311, 315. Nor are the statements invalidated by reason of the fact that appellant was not represented by counsel, no request for such representation ever having been made: Com. v. Spardute, supra, 46. Similarly, the admissibility of the statements is not affected by the fact that in the interrogations appellant was accused of lying or because his guilt was assumed: McClain v. Com., 110 Pa. 263, 269; Com. v. Spardute, supra, 48. And, the application of a lie detector did not vitiate the statements. See Com. v. Hipple, 333 Pa. 33, wherein it was expressly held that an objection based on the fact that a confession was thus induced cannot be sustained, this Court pointing out, at page 39, that 'A confession procured by a trick or artifice, not calculated to produce an untruth, is never vitiated thereby.'

"While appellant testified that they were procured through fear and abuse inflicted upon him by those having him in custody, the witnesses to the statements testified that no force or coercion was used. Where, by the Commonwealth's witnesses, it is shown that a

confession is made voluntarily, without such threat or inducement as might secure a false confession, it must be admitted. If afterwards the defendant testifies, or produces other witnesses who testify, that it was not voluntarily made, it becomes a question for the jury: Com. v. Aston, 227 Pa. 112, 115, 116; Com. v. Shew, 190 Pa. 23, 24; Com. v. Epps, 193 Pa. 512, 515; Com. v. Van Horn, 188 Pa. 143, 168; Com. v. Shaffer, 178 Pa. 409, 414; Volkavitch v. Com., 9 Sadler 327; Underhill on Criminal Evidence, 2d ed., Section 126, p. 242; Com. v. Spardute, supra, 48. The circumstances attending the making of appellant's statement were unquestionably for the jury's consideration under proper instructions by the court, which were given, as follows: 'Now, if you find, members of the jury, that he (appellant) was coerced and compelled by reason of force and violence and threat or otherwise, intimidation of any kind, to make the statements, then they are not his voluntary statements and you should ignore them entirely and give them no consideration whatever. But if you find that he made these statements voluntarily as stated in the statements, then you will give them consideration and determine what is the real truth of the matter.' See Com. v. Farrell, 319 Pa. 441, 444."

V.

AS TO THE FEDERAL LAW AND THE 6th AND 14th AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

DUE PROCESS.

In this State it has always been held, as previously contended herein, that the determination of whether or not

a confession was voluntarily given, in the first instance before it can be admitted in evidence, is for the trial judge. Thereafter, if a defendant denies that it was voluntary and alleges coercion of any kind it becomes a question of *fact* for the jury, first, to determine whether it was voluntary, and if they so decide, then to determine whether or not it is truthful, and if truthful a verdict can be predicated thereon. Therefore appellant's whole argument is based upon his contention that the matter is entirely one of law, whereas it is ultimately, solely one of fact.

A long discussion of some of the problems and developments in the admissibility of confessions is contained in the Texas Law Review, April 1946, Volume XXIV, No. 3, page 239, by Charles T. McCormick, Dean and Professor of Law at the University of Texas. There on page 264, he discusses the celebrated case of LISENBA v. CALIFORNIA, 314 U. S. 219 (1941), and Dean McCormick had this to say:

> "The State's evidence was to the effect that the statement was voluntary, and the trial judge admitted it subject to the jury's finding that it was voluntarily made.'
>
> "The high court, in a long opinion by Roberts, J., affirmed the conviction. The following passages show the court's difficulty in defining the effect it should give to a jury's finding on voluntariness:
>
> 'Where the claim is that the prisoner's statement has been procured by such means (threats or promises), we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. If the evidence bearing upon the question is uncontradicted, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court.
>
> 'There are cases, such as this one, where the evi-

dence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. *In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.*

*'Here, judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made * * *. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law.* (Italics ours.)

'In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claims of physical violence, threats, or implied promises of leniency. There remains the uncontradicted fact that on two occasions, separated by an interval of eleven days, the petitioner was questioned for protracted periods. He made no admission implicating him in his wife's death during, or soon after, the interrogations of April 19, 20 and 21. If, without more, eleven days later, confessions had been forthcoming, we should have no hesitation in overruling his contention respecting the admission of his confessions.

'Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? * * *

'* * * On the facts as we have endeavored fairly to set them forth, and in the light of the findings in the state courts, *we cannot hold that the illegal con-*

> *duct* (Italics ours) in which the law enforcement officers of California indulged, by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their questioning on May 2, *coerced the confessions* (Italics ours) the introduction of which is the infringement of due process of which the petitioner complains.'"

There have recently been some very interesting decisions upon this constitutional question, both Federal and Pennsylvania State. In the case of COM. ex rel. SHAW v. SMITH, 147 Sup. 423, at page 433 in an opinion written by President Judge Keller, he said:

> "The Fourteenth Amendment to the Federal Constitution, the 'due process of law' clause of which—equivalent to the clause in our Constitution: 'Unless by the judgment of his peers or the law of the land,'—has been extended far beyond its original signification, does not require *that the 'process of law' in order to be 'due,' must be the same in all the states, or the same as prescribed for the Federal courts.* The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it *'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'* (Italics ours): Brown v. Mississippi, 297 U. S. 278, 285; Snyder v. Massachusetts, 291 U. S. 97, 105; Hurtado v. California, supra; Missouri v. Lewis, 101 U. S. 22, 31; Lisenba v. California, 314 U. S. 219, 62 Sup. Ct. 280, 290; Mooney v. Holohan, Warden, 294 U. S. 103, 113. 'Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar:' Snyder v. Massachusetts, supra. A judicial practice that has been non existent for 165 years

cannot be said to be so 'rooted in the traditions and conscience of our people as to be ranked as fundamental.'".

This case of COM. ex rel. SHAW v. SMITH, supra, was cited with approval in the case of COM. ex rel. UVEGES, Appellant v. ASHE, 161 Pa. Sup. 58, wherein Judge Rhodes at page 62 said:

"(4) The Sixth Amendment to the Federal Constitution giving to an accused in all criminal prosecutions the right to have the assistance of counsel for his defense applies only to trials in the Federal courts. Betts v. Brady, 316 U. S. 455, 461, 62 S. Ct. 1252, 86 L. Ed. 1595, 1601; Com. ex rel. McGlinn v. Smith, supra, 344 Pa. 41, 45, 24 A. 2d 1, 3.

"(5) The Fourteenth Amendment to the Federal Constitution relating to due process does not impose upon the states any uniform policy concerning representation by counsel in criminal cases; and it cannot be said that the amendment embodies an inexorable command that no trial for any offense, or in any court, would be fairly conducted and justice accorded a defendant who is not represented by counsel. Betts v. Brady, supra, 316 U. S. 455, 473, 62 S. Ct. 1252, 86 L. Ed. 1595, 1607; Com. ex rel. McGlinn v. Smith, supra, 344 Pa. 41, 49, 58, 24 A. 2d 1; Com. ex rel. Shaw v. Smith, supra, 147 Pa. Superior Ct. 423, 433, 24 A. 2d 724; Mayo v. Wade, 5 Cir., 158 F. 2d 614. See also, Foster et al. v. Illinois, 332 U. S. 134, 67 S. Ct. 1716, 91 L. Ed. 1542; Gayes v. New York, 332 U. S. 145, 67 S. Ct. 1711, 91 L. Ed. 1962."

Therefore, the States are not uniformly bound to have like procedure in criminal cases, nor are they held to the same rules concerning the admission of evidence by which criminal trials are conducted in the Federal Courts.

Argument

The Supreme Court of the United States decided in STRAUDDER v. WEST VIRGINIA, 100 U. S. 303, as follows:

> To give the Supreme Court of the United States jurisdiction there must be a denial or inability resulting from the Constitution or laws of a State. The sufficiency of the evidence in a criminal case is not a Federal question.

In WALKER v. SAUVINET, 92 U. S. 90:

> A party is not deprived of his liberty without due process of law if the trial is had according to the settled course of judicial proceedings.

In the case of FRANK v. MANGUM, 237 U. S. 309, 326, 35 S. Ct. 582, 59 L. Ed. 969, it was held:

> It is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.

And this case went on further to hold:

> Where an appeal is given in criminal prosecution, in determining whether defendant has been convicted without due process of law, proceedings in the Appellate Court as well as proceedings in the trial court must be considered.

And the Supreme Court of the United States has gone on further to conclude:

No particular form of procedure is required." (GARLAND v. WASHINGTON, 232 U. S. 642.) "And where the conditions just enumerated are fulfilled there is no violation of the guaranty of due process of law." (PICO v. U. S., 228 U. S. 225.)

In KRUG, 79 Fed. 308, it was said:

> The law by which the question of due process is determined is the law of the jurisdiction where the offense was committed and the trial is had.

Indeed, in MAXWELL v. DOW, 176 U. S. 581, it was held:

> Within constitutional limits, the State and Federal Governments have full control over criminal procedure within their respective jurisdictions * * * When the complaint is merely that a State court has erroneously decided the facts of the case, all the proceedings before it being regular and sufficient, no claim of a denial of due process can be set up. (FRANKLIN v. SOUTH CAROLINA, 218 U. S. 161.

The proper and the now well settled view of these constitutional questions, and the alleged violation of the 6th and 14th Amendments of the Federal Constitution upon the matter of Confessions, is contained in a well written article entitled:

"ADMISSIBILITY OF CONFESSIONS IN THE FEDERAL COURTS AND THE HOBBS BILL," in the Journal of Criminal Law and Criminology, including the American Journal of Police Science, Vol. XXXVIII, No. 2 of July-August, 1947, at pages 136, 137 and 138, as follows:

"The *Hobbs* bill[1] is designed, according to its author,[2] to 'correct' the rule of the *McNabb* case[3] as to admis-

[1] Designated as H. R. No. 4, 1st Session 80th Congress.

[2] Representative Hobbs of Alabama.

sibility of confessions in evidence. That rule, as originally propounded, made a confession taken by federal officers, prior to a deliberately delayed arraignment of a person apprehended for the commission of a crime, inadmissible in evidence. The decision was not based upon the constitutional ground of a violation of due process,[4] *but upon the power of the United States Supreme Court to supervise the administration of criminal justice in the federal courts.*[5] *The application of the rule is limited, therefore, to federal cases and to federal officers.*

"One of the manifestations of disapproval of the *McNabb* decision[6] was the first attempt to pass the *Hobbs* bill, in the 78th Congress.[7] The present bill, which recently died in the Senate Judiciary Committee, is substantially the same as the one which has thrice passed

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[3] McNabb v. United States, 318 U. S. 332 (1943); An Internal Revenue Department Agent was killed in a raid on moonshiners, and the McNabb brothers were apprehended for the crime. Conviction was obtained largely on the basis of the confessions in question. The Supreme Court reversed on the ground that the confessions were inadmissible in evidence. On retrial of the case, it was found that the McNabbs had in fact been duly arraigned, and they were then convicted. McNabb v. United States, 142 F. (2d) 904 (C. C. A. 6th, 1944). In his dissenting opinion in the first McNabb case, Mr. Justice Reed pointed out that the record did not show failure to arraign, nor did counsel raise the issue. 318 U. S. 332, 349 (1943).

[4] **See** Ashcraft v. Tennessee, 322 U. S. 143 (1944); Lisbenda v. California, 314 U. S. 219 (1942).

[5] McNabb v. United States, 318 U. S. 332, 347 (1943).

[6] A rule to the same effect as the Hobbs Bill was originally incorporated in the preliminary draft of the proposed federal rules of criminal procedure, but after being subjected to adverse criticism, was dropped. Holtzoff, Proposed Rules of Criminal Procedure, (1943) 3 F. R. D. 420; Cummings, The Third Great Adventure, (1943) 3 F. R. D. 283.

[7] H. R. No. 3690, 78th Cong. (1st Sess.). The bill met lively opposition on the House floor. The principal objection expressed was that the bill, indirectly authorized violations of the extant federal arraignment statutes. Several representatives argued that such legislation would tend to break down those requirements and sanction the use of "third degree" methods of interrogation. 80 Cong. Rec. February 24, 1947, at 1430 **et seq.**

the House but has thus far failed to pass the Senate.[8] It provides that a failure to observe the requirements of law as to the time within which a person under arrest must be brought before a committing officer shall not render inadmissible any evidence otherwise admissible. The intention was obviously to negate specifically the rule of the *McNabb* case, and to confine the question of admissibility to its previous status.[9]

"In the hearings on the bill before the House Committee, there was a lengthy discussion of the repercussion of the *McNabb* case rule on law enforcement problems.[10] Police officials throughout the federal system claimed to be seriously hampered in the performance of their duties. There were many instances in the lower federal courts of releases of accused persons, even though they had made confessions which would ordinarily have been admissible, but which did not meet the requirements of the *McNabb* case.[11] In some federal courts, however, the *McNabb* case rule was held to be limited quite closely to the particular facts of that case and was not followed in similar situations.[12]

"While at the time of its introduction the *Hobbs* bill would have effectively removed these difficulties by nullifying the effect of the *McNabb* decision, the Supreme Court since then has apparently obviated the need for remedial legislation by its modification of the

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[8] Passed House, 80 Cong. Rec. Feb. 24, 1947 at 1440. Referred to Senate Committee on the Judiciary, 80 Cong. Rec., Feb. 26, 1947 at 1476.

[9] See **infra** note 15.

[10] Hearings before Sub-Committee No. 2 of the House Committee on the Judiciary on H. R. No. 3690, Ser. No. 12 (1944).

[11] Gros v. United States, 136 F. (2d) 878 (C. C. A. 9th, 1943); United States v. Haupt, 136 F. (2d) 661 (C. C. A. 7th, 1943).

[12] United States v. Grote, 140 F. (2d) 413 (C. C. A. 2d, 1944); United States v. Keegan et al, 141 F. (2d) 248 (C. C. A. 2d, 1944).

McNabb case rule in *United States v. Mitchell.*[13] *There the Court phrased the rule of the McNabb case to stand for the proposition that the illegal detention of an accused person will invalidate his confession only when the detention itself acts as an inducement in the procuring of the confession.*[14] (Italics ours.) Seemingly the voluntariness of the confession would thereby be destroyed and its admissibility would be open to due process objections, which would of course override any statutory sanction.[15]

"Mr. Justice Reed's interpretation of the revised *McNabb* case rule, as expressed in his concurring opinion in the *Mitchell* case, is that a confession is made inadmissible by illegal detention and other improper conduct 'even though the detention plus the conduct do not together amount to duress or coercion.'[16] This would mean, then, that something less than a due process violation is still sufficient to prevent the admission of a confession in federal cases. The present rule, therefore, seems to represent a compromise between the basic due process test and the original *McNabb* case principle. Apparently it would be unaffected by the *Hobbs* bill, which was designed primarily to nullify

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[13] **United States v. Mitchell, 322 U. S. 65 (1944).**

[14] **Id. at 68.**

[15] Prior to the McNabb case, the rule as to admissions of confessions in evidence was to the effect that, if an accused was induced to confess by the infliction or threat of physical suffering, or by threats or promises which were likely to cause him to make a false statement, the confession was not admissible. Wilson v. United States, 162 U. S. 613 (1895). Similarly, circumstances of prolonged questioning and detention have been held to be so coercive as to invalidate confessions. White v. Texas, 310 U. S. 530 (1940); Chambers v. Florida, 309 U. S. 227 (1940); Wigmore, Evidence, (3rd ed. 1940) §882. These tests of constitutionality also applied to cases appealed from state courts on due process grounds. See Ashcraft v. Tennessee, 322 U. S. 143 (1944); (accused questioned almost continuously for 36 hours. Questioning held inherently coercive and therefore violative of the Fourteenth Amendment).

[16] **322 U. S. 65, 71.**

the McNabb case rule, and not necessarily to force the Court back to the due process test.

"The problem underlying the opposing views of the original *McNabb* case rule and the *Hobbs* bill is one of reconciling the interest of the individual in security from inquisitorial methods of criminal investigation with the public interest in effective methods of apprehension and prosecution of criminals. *While the individual should have the benefit of a prompt arraignment, efficient law enforcement necessitates a reasonable period of interrogation of a suspected criminal prior to the making of formal charges.*" [17]

This Petitioner was not questioned continuously. He was suspected of many crimes. His statements were checked by the detectives, and their inconsistency, as well as their lack of corroboration from his accomplices was brought to his attention. *This took time* and no Court has ever said that the authorities may not question those suspected of crime.

In UNITED STATES v. MITCHELL, 322 U. S. 65 (1944), Mr. Justice Frankfurter said at page 67:

"We are dealing with the admissibility of evidence in criminal trials in the federal courts. Review by this Court of state convictions presents a very different situation, confined as it is within very narrow limits. *Our sole authority is to ascertain whether that which a state court permitted violated the basic safeguards of the Fourteenth Amendment.* (Italics ours.) Therefore, in cases coming from the state courts in matters of this sort, we are concerned solely with determining whether a *confession* is the result of *torture, physical or psychological*, and *not the offspring of reasoned choice.* How difficult and often elusive an inquiry this implies, our decisions make manifest. And for the

[17] Wigmore, The Science of Judicial Proof (3rd ed. 1937) §276.

important relation between illegal incommunicado detention and 'third degree' practices, see IV. Report, National Commission on Law Observance and Enforcement (better known as the Wickersham Commission), (1931), pp. 4, 35 et seq., 152; and the debates in the House of Commons on the Savidge case, 217 H. C. Deb. (5th ser. 1928), pp. 1216-1220, 1303-1339, 1921-1931, and Inquiry in Regard to the Interrogation by the Police of Miss Savidge, Cmd. 3147 (1928); Report of the Royal Commission on Police Powers and Procedure, Cmd. 3297 (1929). But under the duty of formulating rules of evidence for federal prosecutions, we are not confined to the constitutional question of ascertaining when a confession comes of a free choice and when it is extorted by force, however subtly applied. See UNITED STATES v. OPPENHEIMER, 242 U. S. 85, 88. *The McNabb decision was an exercise of our duty to formulate policy appropriate for criminal trials in the federal courts.* We adhere to that decision and to the views on which it was based. (For cases in which applications of the McNabb doctrine by circuit courts of appeals were left unchallenged by the Government, see United States v. Haupt, 136 F. 2d 661; Gros v. United States, 136 F. 2d 878; Runnels v. United States, 138 F. 2d 346):

"But the foundations for application of the McNabb doctrine are here totally lacking. Unlike the situation in other countries, see, for instance, §§25 and 26 of the Indian Evidence Act, 1872,[1] under the prevailing American criminal procedure, as was pointed out in the McNabb case, 'The mere fact that a confession was made while in the custody of the police does not render

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[1] §25: "No confession made to a Police officer, shall be proved as against a person accused of any offense."

§ 26: "No confession made by any person whilst he is in the custody of a police office, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

it inadmissible." 318 U. S. at 346. Under the circumstances of this case, the trial courts were quite right in admitting, for the juries' judgment, the testimony relating to Mitchell's oral confessions as well as the property recovered as a result of his consent to a search of his home. As the issues come before us the facts are not in dispute and are quickly told.

"In August and early October 1942, two houses in the District of Columbia were broken into and from each property was stolen. The trail of police investigation led to Mitchell who was taken into custody at his home at 7 o'clock in the evening on Monday, October 12, 1942 and driven by two police officers to the precinct station. Within a few minutes of his arrival at the police station, Mitchell admitted guilt, told the officers of various items of stolen property to be found in his home and consented to their going to his home to recover the property.[3] It is these admissions and that property which supported the convictions, and which were deemed by the court below to have been inadmissible. Obviously the circumstances of disclosure by Mitchell are wholly different from those which brought about the disclosures by the McNabbs. Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights, but instead the consent to a search of his home, the prompt acknowledgment by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and concession of guilt.

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[3] In both cases Mitchell denied the testimony of the officers that he had in fact made prompt and spontaneous confession and consent to the search of his home and on the basis of such denial motions were made to exclude the evidence. The trial judges ruled that whether these statements were in fact made in the circumstances narrated were questions of fact for the juries. As such they were left to the juries, and we here accept their verdict as did the court below. Mitchell, it must be emphasized, merely denied that he made these statements and so did not contest the time of making them. While at the trial there was a claim by Mitchell that he was abused by the police officers, in the state of the record that issue is not here.

"But the circumstances of legality attending the making of these oral statements are nullified, it is suggested, by what followed. For not until eight days after the statements were made was Mitchell arraigned before a committing magistrate. Undoubtedly his detention during this period was illegal. *The police explanation of this illegality is that Mitchell was kept in such custody without protest through a desire to aid the police in clearing up thirty housebreakings, the booty from which was found in his home.* (Italics ours.) Illegality is illegality, and officers of the law should deem themselves special guardians of the law. But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence."

Mr. Justice Douglas and Mr. Justice Rutledge concur in the result and Mr. Justice Black dissented. Mr. Justice Reed filed a concurring opinion on page 71 of U. S. v. MITCHELL, supra, as follows:

"As I understand McNabb v. United States, 318 U. S. 332, as explained by the Court's opinion of today, the McNabb rule is that where there has been illegal detention of a prisoner joined with other circumstances which are deemed by this Court to be contrary to *proper conduct of federal prosecutions*, the confession will not be admitted. Further, this refusal of admission is required even though the detention plus the conduct do not together amount to duress or coercion

If the above understanding is correct, it is for me a desirable modification of the McNabb case.

"However, even as explained I do not agree that the rule works a wise change in federal procedure.

"In my view detention without commitment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary. The juristic theory under which a confession should be admitted or barred is bottomed on the testimonial trustworthiness of the confession. If the confession is freely made without inducement or menace, it is admissible. If otherwise made, it is not, for if brought about by false promises or real threats, it has no weight as proper proof of guilt. WAN v. UNITED STATES, 266 U. S. 1, 14; WILSON v. UNITED STATES, 162 U. S. 613, 622; 3 Wigmore Evidence (1940 Ed.) §882.

"As the present record shows no evidence of such coercion, I concur in the result."

VI.

WITH REFERENCE TO PETITIONER'S ALLEGED REQUEST FOR COUNSEL.

Petitioner did not ask for counsel (R. 86) and so states himself (R. 133).

Nevertheless his Honor Judge Frank Smith, the trial judge, in his very learned opinion (R. 282a) said:

"The defendant furthermore contends that he was deprived of his constitutional right in not being furnished with counsel. The defendant testified that during the time he was examined, he asked for counsel and that same was refused him. The police officers testified that the defendant did not ask for counsel. The verdict of the jury shows that they believed the

testimony of the police officers and as we have before stated, they had an opportunity of observing this defendant and the police officers and weighing their testimony. This defendant is not the poor, moronic type of negro similar to those accused in some other cases. He is a clever, knowing criminal.

"The same question arose in the case of Comwlth. v. Spardute, 278 Pa. 37, 46, where the defendant testified that he made a request for counsel and it had been denied him. The court stated that it would have been a grave infraction of his rights if this were so, but that this testimony was denied by the police that any such request was made, and the Supreme Court in that case, acted upon the assumption that the verdict of the jury was justified and the evidence of the police was true.

"It is clear from a reading of the cases that the right of an accused for the appointment of counsel under the common law did not exist, and that right in this jurisdiction did not exist until by Statute and constitutional provisions it was specifically created. In this Commonwealth by the Act of May 31, 1718, 1 Sm. L. 105, Sec. 4, it was provided 'that learned counsel be assigned to the prisoners' * * * 'upon all trials of capital crimes.' Then the Act of March 22, 1907 P. L. 31, Section 1, 19 Purdon, P. S. Sec. 784, provided for the compensation of such assigned counsel. There is nothing in the Constitution or the Acts of Assembly of this Commonwealth which indicate that an accused has a right to have counsel appointed upon being taken into custody. The law provides that he shall have the right of counsel to represent him at trial. In the case of Com. ex rel. Shaw v. Smith, 147 Pa. Superior Ct. 423 Keller, P. J. (on page 432) said:

'We respectfully submit that the word, defense, as used in the phrase in the Sixth Amendment to the Federal Constitution, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial * * * and to have the Assistance of Counsel for his defense, contemplates defense at a speedy and public *trial;* and Mr. Justice Black has said, The very word trial connotes decisions on the evidence and argument properly advanced in open court.' "

The cases previously cited indicate that the Court was not in error in having presented to the court and jury what Johnson, Lofton and Turner said after being sworn before Magistrate Williams, and after all three were amply warned that anything said at the time under oath would be used at time of the trial in court.

The trial judge, Frank Smith, in his opinion has cogently stated the crux of this case when he said (R. 267):

"Common sense tells us that in cases of brutal, vicious murder where the victim is dead and the murderer is the only living person who was present at the scene of the crime, all such crimes would go unpunished if the police officers were entirely hampered in their efforts to procure information upon which to base a charge of homicide. In many such cases, it is only by patient, determined and searching police work that the officers may get sufficient information upon which to base a reasonable suspicion that a certain person was involved in the crime. * * * It seems to us as long as the actions of the police are those which would have the approval of sober-minded, reasonable men, that they should be permitted to make such proper investigation to ascertain the truth, so that the man in custody might either be discharged or brought before a magistrate as soon as is reasonably practical for a hearing. *The question of whether the detention of the accused be for an hour, or a day, or for five days, is not the deciding factor since inherently any detention for any period of time, no matter how short, may be classed as coercive.* (Italics ours.)

VII.

FURTHER REFERENCE TO DUE PROCESS OF LAW UNDER THE 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

In MISSOURI v. LEWIS, 101 U. S. 22, 31, Mr. Justice Bradley said:

> "The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury and on the other side no such right. Each State prescribes its own mode of judicial proceeding."

The 14th Amendment, by parity of reasoning refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exercised within the limits of these fundamental principles of liberty and justice which lie at the base of our civil and political institutions, and the greatest security for which rests in the right of the people to make their own laws and alter them at their pleasure.

In the recent case of TOWNSEND v. BURKE, Warden, U. S. Supreme Court, No. 542, October Term, 1947, in an opinion delivered June 14, 1948, Mr. Justice Jackson referred to McNABB v. U. S., 318 U. S. 332 in the following language:

> "The plea for relief because he was detained, as he claims, unlawfully is based on McNabb v. United States, 318 U. S. 332. But the rule there applied was one against use of confessions obtained during illegal de-

tention and it was limited to federal courts, to which it was applied by virtue of our supervisory power. In this present case no confession was used because the plea of guilty in open court dispensed with proof of the crime. Hence, lawfulness of the detention is not a factor in determining admissibility of any confession and if he were temporarily detained illegally, it would have no bearing on the validity of his present confinement based on his plea of guilty, particularly since he makes no allegation that it induced the plea."

And as to HALEY v. OHIO, 332 U. S. 596, as follows:

"Petitioner also relies on Haley v. Ohio, 332 U. S. 596, in which this Court reversed a State court murder conviction because it was believed to have been based on a confession wrung from an uncounseled 15 year old boy held incommunicado during questioning by relays of police for several hours late at night. Even aside from the differing facts, that case provides no precedent for relief to this prisoner since, as has been said, no confession was used against him, and he does not allege that his pleas of guilty resulted from his allegedly illegal detention."

The petitioner in the instant case was afforded all his constitutional rights. His trial was in accordance with the long established criminal procedure of the courts of Oyer and Terminer of the Commonwealth of Pennsylvania. As Mr. Chief Justice Maxey of the Supreme Court of Pennsylvania said in his opinion at (R. 313):

"Anyone with experience in the administration of criminal law who reads the answers Turner made to the questions put to him will readily conclude that the statements he made to the officers were not those of a coerced or scared witness but that they were the statements of a man who had committed a murder and whose

recital of its details was clear and explicit. The teller of the gruesome story of this double murder was obviously drawing on his memory and not on a fear-fired imagination. His narrative dovetailed so accurately with the physical facts surrounding the crime and with the story told by his accomplices that there can be no reasonable doubt of the story's truthfulness."

And further on in his opinion (R. 319):

"Anyone believing Turner's later assertions that he had been coerced into making his incriminating statements about the commission of these murders would be too credulous to be safely entrusted with any part in the realistic work of administering the criminal law with justice both to the accused and to society."

Mr. Justice Maxey in his discussion of the matter continued (R. 320):

"On the other hand, for a court to hold that a confession made by a well fed and decently cared for prisoner after he has been held in custody for a few days without counsel or contact with friends and after he has been questioned a few hours every day by police officers in reference to a crime of which he is suspected, is inadmissible as being a coerced confession would be unrealistic and impractical. Such a judicial holding would result in a vast increase in the already too large number of felons who go unpunished and are free to prey upon law abiding citizens. These enemies of society naturally endeavor to commit their crimes where there are no witnesses except themselves and their victims. When the victim is killed the murderer feels himself safe. Fortunately for society, criminals soon become possessed of an impulse to disclose their guilty secrets."

A CONSIDERATION OF RECENT FEDERAL SUPREME COURT DECISIONS AND THEIR APPLICATION TO PETITIONER'S CASE.

ASHCRAFT v. TENN., 322 U. S. 143 (1944).

It was uncontradicted that Ashcraft had been held incommunicado for thirty-six hours, during which time, without sleep or rest, he had been interrogated by relays of officers and investigators. That was held by the U. S. Supreme Court to be "inherently coercive."

In this case of Petitioner Turner, neither he nor his two accomplices were ever questioned for more than a few hours at a time, nor were they ever denied adequate food or rest. They neither asked for nor were they denied counsel. Their conflicting and untrue statements had to be first checked and then brought to their attention and then checked again. With their numerous details, this consumed time. Their detention of itself was not coercive, and many times this high Court has said that questioning of persons suspected of crime by the authorities is not improper.

LISENBA v. CAL., supra,
WAN v. UNITED STATES, 266 U. S. 1.

LYONS v. OKLA., 322 U. S. 596.

This case is exactly in point with that of Petitioner Turner. This high Court there held:

> "Where the evidence as to whether there was coercion is conflicting, or where those inferences may not fairly be drawn from the admitted facts, the question whether a confession is voluntary is for the triers of the fact." (p. 602).

It is contended that in the Petitioner's case as in the Lyons case, the instructions of the Trial Judge to the jury

fairly raises this question of fact and did not deny to the Petitioner any right under the 14th Amendment to the Federal Constitution, to which he was entitled. He was tried in accordance with the long established law and in accordance with the decisions and opinions of the Pennsylvania Supreme Court, during the two and quarter centuries of its existence." (R. 314).

"The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused at the time he confesses is in possession of "mental freedom" to confess to or deny a suspected participation in a crime."

Lyon's second confession was held voluntary, whereas this Petitioner Turner, made confessions or admissions on three distinct occasions: first in his own writing, signing the confessions of his two accomplices as a witness; then admitted his participation in open Court under oath; and lastly, at a re-enactment of the crime at the scene, heard his confederates describe it in detail and said he had nothing to say.

BROWN v. MISS., 297 U. S. 278 (1936) (Murder);
LEE v. MISS, 68 S. Ct. 300 (1948) (Rape).

Both Brown and Lee were adolescents, whereas Petitioner is mature, and characterized by the trial Judge as a "smart, clever criminal." (R. 276-R. 282). Brown and Lee both were ignorant and untutored, threatened and abused by white officers and officials of whom they were in great fear. The authorities did not question the evidence that showed the confessions were obtained by coercion.

In Petitioner's case, his allegations of brutality are weak and not credible. His assertions are denied absolutely.

CHAMBERS v. FLA., 309 U. S. 227.

This was a situation in which defendant was threatened with mob violence and the confession obtained under circumstances that obviously inspired terror.

There was not the slightest suggestion of any such an

occurrence in Petitioner Turner's case. He had every legal right that can be accorded to a defendant in this Commonwealth. The questioning of Turner was not such as would inspire terror in him or his confederates.

HALEY v. OHIO, 68 S. Ct. 302.

Haley was a fifteen year old boy, questioned in the dead of night by police officers without surcease.

Petitioner was never interrogated more than a few hours at a time, and never after midnight by his own admissions at trial, and he was fed and allowed adequate sleep. (R. 118-R. 125, inclusive).

MALENSKI, et al. v. N. Y., 324 U. S. 401.

The defendant was arrested, stripped, held incommunicado in a down town New York City hotel, and his arraignment was purposely delayed. All those facts were admitted by the prosecution which attempted to justify them.

Turner was never subjected to any cruel treatment, and his arraignment was not purposely delayed but only because of the necessity for the police officers to check upon the verity of his statements and those of his accomplices. When, and only when, their inconsistency was evident to him and them, did they start to tell the truth.

LISENBA v. CALIFORNIA, 314 U. S. 219.

The "rattlesnake" case. Prolonged questioning by officers is not of itself conclusive as to coercion, and, like the later MITCHEL v. U. S. case, supra, illegal detention must of itself bring about the confession to violate the 'due process of law' clause of the Constitution.

McNABB v. U. S., 318 U. S. 332 (1943).

This was a trial in Federal District Court and the decision of the U. S. Supreme Court was based upon its power to prescribe rules of evidence, and to regulate the admission

in Federal Courts of confessions and the trial procedure to be followed by those tribunals. Illegal detention by Federal authorities was held to be coercive.

U. S. v. MITCHELL, supra, clarified this decision to the effect that "the illegal detention of an accused person will invalidate his confession only when the detention itself acts as an inducement in the procuring of the confession."

Reference is here made to an illuminating discussion by Peter A. Dammann in The Journal of Criminal Law and Criminology including the American Journal of Police Science, Vol. XXXVIII, No. 6, March-April, 1948 at page 627 upon Recent Federal Court Decisions on the "Admissibility of Confessions" as follows:

"RECENT FEDERAL COURT DECISIONS ON THE ADMISSIBILITY OF CONFESSIONS.

The Inherent Coercion (Ashcraft Case) Rule.

'In *Haley v. State of Ohio*,[1] a fifteen year old negro confessed to a murder after having been questioned for five hours by Ohio police officers 'in relays of one or two each.' The trial court admitted the confession in evidence, along with some other rather substantial proof of defendant's guilt. His conviction was affirmed by the Ohio appellate courts. The United States Supreme Court, however, in a 5-4 decision reversed the conviction because the majority of the Court found that the 'undisputed evidence suggests that force or coercion' was employed by the police interrogators, thus constituting a violation of the due process clause of the Fourteenth Amendment. The undisputed evidence relied upon by the Court was the fact that the fifteen year old defendant had been questioned about five

[1] 68 S. Ct. 302 (1948).

hours by five or six police officers 'in relays of one or two each.' These circumstances the majority of the Court considered as suggestive of force or coercion. The use of the test of 'suggestion' of force and coercion imparts the same notion as did the Court's previous expression of 'inherent coercion' which was employed in the *Ashcraft* case.[2] In other words, what the Court did in both the instant case and in the *Ashcraft* case was to make a psychological appraisal of the interrogation and then decide whether it had a *tendency* to coerce a confession. The effect of the interrogation on the particular defendant was of no prime importance, nor did the Court concern itself with the trustworthiness of the confession. It was sufficient if the circumstances merely 'suggested' coercion.

The *Haley* case is another illustration of an apparent effort on the part of the United States Supreme Court to compel state law enforcement officers to employ what it considers higher standards of interrogation practices. This the Court could not do directly because of the absence of supervisory power comparable to that which it has over lower federal courts and federal officers, but the same attempt is practically available by extending the Court's interpretation of due process to prohibit 'inherently coercive' or 'suggestively coercive' police practices.[3]

Inconsistent Defenses Regarding Evidence of a Confession

Does an accused person lose his right to contend that a confession was coerced because of his testimony that the confession was in fact never made?

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[2] Ashcraft v. Tennessee, 322 U. S. 143 (1944).

[3] For an analysis of the recent series of United States Supreme Court cases on confessions, in which the above stated conclusion is reached, see Inbau, F.E., Lie Detection and Criminal Interrogation (2d ed., 1948) 150-162.

In *Lee v. State of Mississippi*,[4] a seventeen year old negro was accused of assault with intent to rape. At his trial the prosecution offered in evidence the testimony of two police officers regarding an alleged oral confession obtained by them from the accused. Objection was made by the defendant to the admissibility of the confession on the ground that it had been secured by force. In a hearing out of the presence of the jury, defendant testified that he had been threatened prior to making the confession, and his testimony to that effect was uncontradicted. At this preliminary hearing, and later on during the trial, he also testified that he did not at any time admit that he committed the crime. His trial resulted in a verdict of guilty. In affirming the conviction the Mississippi Supreme Court said that if the accused had not denied having made the confession at all the case probably would have been reversed (because of his uncontradicted testimony during the hearing by the court on the admissibility of the confession), but that the conviction must be affirmed because 'one accused of crime cannot be heard to say that he did not make a confession at all, and at the same time contend that an alleged confession was made under the inducement of fear.'

Upon appeal to the United States Supreme Court the Mississippi court's decision was reversed on the ground that the defendant's denial of making the confession did not preclude him from asserting his constitutional right to due process of law. The Court was of the opinion that the defendant's denial of the confession 'went only to the original issue of whether he actually made the confession,' and the defendant still had the right to show that if a confession was actually made (as the police testified) he did so because of the coercive methods of his interrogators.

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[4] 68 S. Ct. 300 (1948).

The Delayed Arraignment (McNabb Case) Rule

The 'civilized standards' rule for federal law enforcement interrogators, as originally stated in the *McNabb* case,[5] seemingly required the rejection of confessions in any federal cases in which the officers neglected to comply with the statutory duty to take the arrested person before a committing magistrate 'forthwith' (or 'immediately,' or 'without unnecessary delay'). Subsequently the rule was modified somewhat by the Supreme Court in the *Mitchell* case[6] which held that the *McNabb* case exclusionary principle would be invoked only when the confession was 'induced by the illegal detention,' and not in a situation such as in the *Mitchell* case where the confession preceded the illegal detention. Even after the *Mitchell* case some uncertainty still existed as to the effect of illegal detention of this sort on the admissibility of confessions. The still prevailing confusion upon this point is illustrated in the recent case of *Boone v. United States*,[7] a decision of the United States Court of Appeals for the District of Columbia, the same court which in the *Mitchell* case had interpreted the *McNabb* case decision of the Supreme Court as requiring a nullification of an otherwise voluntary confession whenever illegal detention was involved. In the *Boone* case, the defendant was arrested about 9 o'clock on a Saturday morning, placed in a police showup about 11 o'clock, at which time he was identified by his robbery victim, and then for about twenty minutes he was questioned by the arresting officer. He was also again questioned about 5 o'clock that afternoon for twenty or twenty-five minutes, and later, between 9 and 10 p. m. the defendant requested to talk to the arresting officer and confessed his guilt

[5] McNabb v. United States, 318 U. S. 332 (1943).

[6] United States v. Mitchell, 322 U. S. 65 (1944).

[7] 164 F. (2d) 102 (1947).

on that occasion. The next day (Sunday), at about 1 p. m., the defendant surrendered to the same officer the money proceeds of the robbery, which the defendant had concealed in his shoe. Defendant was not arraigned until Tuesday morning. At his trial he denied making the confession. He was convicted and upon appeal his counsel contended that the illegal detention rendered the otherwise voluntary confession inadmissible in evidence. The Court of Appeals, in sustaining the trial court's ruling in admitting the confession, said: 'Counsel's interpretation of the McNabb case accords with the view taken by us of that case in our later decision in the Mitchell case. But on appeal to the Supreme Court our view was rejected and the Supreme Court itself interpreted its language in the McNabb case wholly contrary to the position now taken by counsel for appellant in this case. In the Mitchell case the Supreme Court said, as it had said in the McNabb case, that inexcusable detention for the purpose of extracting evidence from the accused is both wrong and unlawful, but pointed out that while this is true, detention, standing alone, does not affect the admissibility of the confession except where it appears that the disclosure is induced by it. In short, that unlawful detention, without more, does not require rejection of a confession otherwise admissible and that is this case.'[8]

PETER A. DAMMANN."

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[8] For a detailed discussion of the delayed arraignment (McNabb case) rule, see Inbau, **op. cit. supra** note 3 at pp. 162-169.

CONCLUSION

This was a brutal killing, not of one man but of two, in the perpetration of robberies. The petitioner played the dominant, major role. It was his hand that wielding the iron sash weight bludgeoned these two men to their deaths.

The judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

COLBERT C. McCLAIN,
Assistant District Attorney,
JOHN H. MAURER,
District Attorney,
666 City Hall,
Philadelphia 7, Pa.,
Attorneys for Petitioner.

APPENDIX TO APPELLEE'S BRIEF.

IN THE

COURT OF OYER AND TERMINER

FOR THE COUNTY OF PHILADELPHIA, PENNSYLVANIA.

COMMONWEALTH
v.
CLARENCE LOFTON.

June Sessions, 1946.
No. 646.
Charge: Murder.

Room 453, City Hall, Philadelphia, Pa., Friday, January 31st, 1947.

Before: HON. EDWIN O. LEWIS, J.; HON. JOSEPH SLOANE, J.; HON. VINCENT A. CARROLL, J.

PRESENT:

COLBERT C. McCLAIN, Esq., Assistant District Attorney, for the Commonwealth.

G. VON PHUL JONES, Esq., and W. WYCLIF WALTON, Esq., for the Defendant.

DISCUSSION.

(Stenographer's Note: Judge Carroll was not on the bench at the commencement of the following proceedings but took his place at the point indicated in the transcript of testimony.)

THE COURT: Are you ready, Mr. Jones?

MR. JONES: Yes, sir.

(The defendant was brought to the bar of the court, where his counsel conferred with him.)

COURT CRIER BEASTON: Clarence Lofton, do you want to withdraw your plea of not guilty to this bill of indictment charging you with murder in causing the death of Frank Endres? Do you wish to withdraw that plea?

THE DEFENDANT: Yes.

COURT CRIER BEASTON: And plead guilty generally?

THE DEFENDANT: Yes.

MR. McCLAIN: If your Honors please, in this case, on December 15th, 1945, three men—one named Aaron Turner, known as "Treetop," another one, Jasper Johnson, also known as "Fats" and "Playboy," and this defendant, Clarence Lofton, went to the premises 355 North 2nd Street in the city and county of Philadelphia. Aaron Turner was armed with a short piece of pipe, which has been referred to as a sash weight, and he entered the store occupied by

the Ace Broom Company, together with Jasper Johnson. The small man in the store, Frank Endres, was met first by Aaron Turner, and his skull was crushed by this sash weight in the hands of Turner, and while he was lying in the floor, Jasper Johnson robbed him.

In the conspiracy to commit this robbery, this defendant, Clarence Lofton, was placed outside as a look-out man.

After Endres' skull was crushed and while he was being robbed by Jasper Johnson, the other man in the store, Charles Simmons, came running in and Aaron Turner also crushed his skull with the sash weight and robbed him.

The three men ran away then and divided the proceeds of the robbery. As far as the Commonwealth has been able to ascertain, sirs, Lofton did not know that these murders were being committed inside the place, although he was a part of the conspiracy to go there and rob. After the robbery was consummated and, of course, before the two victims died, Clarence Lofton, not knowing whether they were alive, or probably not knowing what had gone on in the store at the time, took part of the proceeds of the robbery.

We will show your Honors the facts. Lieutenant Kelly is here. We have three signed confessions—not only a confession from Clarence Lofton but one from Jasper Johnson and one from Aaron Turner which Clarence Lofton also witnessed.

I am informed by counsel for the defendant that the prisoner will agree that Frank Endres, upon which bill of indictment he has pleaded guilty generally, this man died two or three days after the commission of this assault upon him, which was an assault committed in the perpetration of a robbery.

Do you agree that the Commonwealth has proved the death of Frank Endres, and that the autopsy made by the coroner's physician showed that he died from a blow upon the head?

MR. WALTON: Yes, we will agree that he died.

JUDGE SLOANE: Didn't Endres die right there in the factory?

MR. McCLAIN: No, sir. He died in the Hahnemann Hospital on the 17th of December, two days later.

The Commonwealth will show to you, sirs, that this was a homicide in the commission of a robbery, and under such circumstances, under the law of Pennsylvania could be nothing less than murder in the first degree. This defendant or this prisoner, being part of the scheme to rob and acting as the look-out man, is just as legally responsible for the acts of the others as if he had done it himself. While there is no legal difference, we can say there is one slight moral difference. He did not know the assaults were taking place and he was on the outside of the premises. Under those circumstances, plus the fact that Lieutenant Kelly, in charge of the Homicide Squad of the Philadelphia Police Department, informs the district attorney's office that Lofton has been of assistance to them in other matters, other murders here in the City of Philadelphia—he gave them information that helped them to solve these murders—and under those circumstances, if your Honors do determine that this murder in the first degree, then the district attorney's office would feel constrained to recommend that the lighter penalty of life imprisonment be inflicted instead of the death penalty

JUDGE LEWIS: Mr. Assistant District Attorney, must we not have three judges to hear this?

MR. McCLAIN: I think under the circumstances, even the prisoner himself will agree that the testimony taken at this trial ——

JUDGE LEWIS: Which trial?

MR. McCLAIN: This one here, at this hearing, be sub-

mitted to a third judge. I think under the circumstances that will be sufficient.

JUDGE LEWIS: What leads you to that conclusion?

MR. McCLAIN: The case of the Commonwealth vs. Shole in 325 Pennsylvania.

JUDGE LEWIS: May we have that book?—because we do not want to put Judge Sloane to the trouble, nor would I want it myself, in duplicating or repeating this hearing later. It might be better to have a third judge now.

MR. McCLAIN: Well, sir, the testimony will be very brief.

JUDGE LEWIS: Mr. Beaston, could we ask you to surrender your duties here for a few minutes and see if you can see Judge Carroll and ask him, with our compliments, to come up and sit with us? If Judge Carroll is not available, perhaps Judge Gordon might be available. Meanwhile Judge Sloane and I will read this report.

MR. JONES: If your Honor please, according to this case, which I referred to the Assistant District Attorney—of course, the custom has grown up here to consider the word "court" as construed to mean more than one judge, but this decision holds that the word "court" means one judge as well as a court en banc, and it dispels that idea of requiring three judges. Of course, we know in this county it has been the custom, but the custom doesn't have to be followed where there is no occasion for it.

JUDGE SLOANE: It is a rule of court.

MR. JONES: We will waive that rule of court. We are anxious to get through with it.

(At this point Judge Lewis spoke and directed that his remarks be off the record.)

MR. JONES: May I suggest to your Honors, then, that in this case you will not be burdened with the requirement of determining what the grade or degree of the crime is? We all know it is fixed by the act. This man participated in this robbery, therefore he is guilty of first degree. The only question that comes before you is, What is the punishment to be? Capital punishment or life imprisonment? Therefore, the only question your Honors will pass upon is what penalty will be imposed, which can be done by one or two judges as well as by three.

JUDGE SLOANE: Very recently Justice Jones, in the case of Commonwealth vs. Jones, said that a man cannot plead guilty to murder of the first degree.

JUDGE LEWIS: He can only plead guilty to murder, and the court must fix the degree, and that presupposes, under the rule of court, a court consisting of three judges. I think we had better wait a few minutes and get a third judge. Furthermore, a third judge may help us a great deal.

By the way, has Lofton any prior criminal record?

MR. McCLAIN: Yes, sir, he has a very long record.

(At this point there was a recess in the hearing of this case while the court proceeded to other business. At the resumption of the hearing of the case of Commonwealth vs. Lofton, the entire court (Lewis, J., Sloane, J. and Carroll, J. were on the bench).

JUDGE LEWIS: Mr. McClain, Judge Carroll is here now. He can stay only for about five minutes and then he will have to leave and return later. We will go on with the testimony until Judge Carroll has to leave.

Discussion

(At this point there was a conference of the full court.)

JUDGE LEWIS: Judge Carroll will sit at the beginning of the hearing and he will then have to leave, but he will participate in the disposition of the case. Is that agreeable to you and your client, Mr. Jones?

MR. JONES: I did not hear your Honor.

THE COURT (JUDGE LEWIS): Judge Carroll and Judge Sloane will sit with me at the outset of the hearing but Judge Carroll, by reason of a prior engagement, must leave in a few minutes and will return as soon as he can. It has been decided in the conversation of the three judges that Judge Carroll will read what occurs in his absence and will participate in the decision. Is that satisfactory to you?

MR. JONES: Yes.

MR. WALTON: Is that satisfactory to you, Lofton?

THE DEFENDANT: Yes.

MR. McCLAIN: The defendant himself agrees.

COMMONWEALTH'S EVIDENCE.

MR. McCLAIN: I think we have already agreed for the record that the corpus delicti—the defendant agrees, in view of the two prior trials—Commonwealth vs. Aaron Turner and Commonwealth vs. Jasper Johnson—that the corpus delicti is admitted, that Frank Endres came to his death by a crushing of the skull by blows inflicted on him on

the 15th of December, 1945, at the premises 355 North 2nd Street in the city and county of Philadelphia, and that he died in the Hahnemann Hospital on December 17th, 1945 and that a post mortem performed by Doctor William S Wadsworth, showed the cause of death to be a crushing of the skull. Is that agreed to by the defendant?

MR. WALTON: Yes.

JUDGE CARROLL: That sounds like Commonwealth vs. Jones.

MR. McCLAIN: Very similar, sir, except this was a homicide committed in the perpetration of a robbery.

DETECTIVE LIEUTENANT JAMES A. KELLY, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. McCLAIN:

Q. Tell their Honors about the death of Frank Endres in the plant of the Ace Broom Company—, or, rather, about the beating which was inflicted upon him on December 15th. 1945, and which resulted in his death two days later in the Hahnemann Hospital

A. Shall I review ——

Q. Just tell about where and when the defendant was arrested and about the robbery and the injuries that were inflicted upon Endres and Simmons and when they died. briefly and to the point.

(At this point Judge Carroll left.)

A. At about 5 p. m. on December 15th, 1945, a patrolman trying the doors at 355 North 2nd Street in the city of Philadelphia, a broom factory known as the Ace Broom Factory, entered the place because of the fact that the door was open, and upon entering the room, just inside the doorway, he found the bodies of two men, both apparently alive at the time, lying on the floor, one of the men with some movement to his body and the other body was unconscious. These men were later identified as Frank Endres and Charles Simmons. Frank Endres was a man 63 years of age. He was a broom maker, employed at the factory. Charles Simmons was the owner of the factory. He was also a man up in years. He was 62 years of age—past normal middle age.

These two men were taken to the Hahnemann Hospital, treated there and detained, and subsequently died. Frank Endres died on December 17th, 1945, I believe, and Charles Simmons died a couple of days after that.

Q. I think it was December 21st, 1945.

A. Endres was on the 17th and Simmons was on the 21st. On or about May 19th, 1946, an investigation was started by myself, along with the detectives working for me, relative to another murder in the city of Philadelphia, and during the process of the investigation, this defendant here was taken into custody, along with nine or ten other defendants. So the investigation continued on until June 8th, at which time this particular case of homicide was separated from the others. During this time in our custody, he did make a statement pertaining to this particular homicide.

Q. I show you a statement, Lieutenant Kelly. Is that one that Clarence Lofton, this prisoner, made in your presence?

A. That is the statement he made in my presence relative to this particular homicide.

Q. And is it signed by the defendant, Clarence Lofton?

A. It is signed by the defendant, Charles Lofton, in the

presence of the two other defendants, Jasper Johnson and Aaron Turner, and read by all three and signed by all three.

Q. On each page?

A. On each page.

Q. Did you also get a statement from Jasper Johnson in the presence of this prisoner, Clarence Lofton, and Aaron Turner?

A. Yes, I did.

Q. Was that signed by Jasper Johnson?

A. It was.

Q. Was it witnessed by Clarence Lofton, this prisoner, and Aaron Turner?

A. It was.

Q. On each page?

A. On each page and at the conclusion.

Q. Did you also, Lieutenant Kelly, get a statement from Aaron Turner, the third man, in the presence of this prisoner, Clarence Lofton, and Jasper Johnson?

A. I did.

Q. And is that witnessed by Clarence Lofton and Jasper Johnson, as well as being signed by Aaron Turner?

A. It is.

Q. On each page?

A. On each page and at the conclusion.

Q. Will you just briefly give their Honors a resume of these statements and what happened at the Ace Broom Factory at 5 p. m. on that afternoon?

A. On the afternoon of December 15th, 1945, Clarence Lofton, together with Jasper Johnson and Aaron Turner, met in a saloon in the vicinity of 12th and Bainbridge ——

JUDGE LEWIS: Why not let the defendant tell us? It would be better to have the defendant tell us.

MR. McCLAIN: Very good, sir. I have just one other question.

BY MR. McCLAIN:

Q. Lieutenant Kelly, following the signing of the statement, or during the time they were signed, was a magistate's hearing held?

A. It was.

Q. Before Magistrate Williams?

A. Before Magistrate Williams.

Q. And at that time were these three defendants—Lofton, Turner and Johnson—before the magistrate in your presence?

A. Yes, they were.

Q. Was Mr. D. Barlow Burke there, representing the District Attorney's office?

A. Yes, sir.

Q. Did Jasper Johnson and Clarence Lofton make voluntary statements in front of the magistrate, after being warned by Mr. Burke?

A. They did.

Q. In your presence did you hear Mr. Burke say, "Do any of you men want to say anything this morning? I want to warn you in advance that anything you say may be used against you in court, and that you don't have to say anything if you don't want to. I understand, however, that you have made statements to the officers and signed those statements. Jasper Johnson, you have made a signed statement to the officers?"

Jasper Johnson answered, "Yes."

Question by Mr. Burke: "Do you want to say anything this morning?"

And Jasper Johnson answered, "Yes, sir."

Now, Lieutenant Kelly, was Jasper Johnson thereafter sworn and did he make a statement substantially in conformity with the one he had signed or did sign in the detective bureau?

A. He did, and he corroborated the statement of Jasper Johnson.

Q. This defendant corroborated ——

A. Yes.

Q. But first Jasper Johnson made a statement before the magistrate and then later Clarence Lofton, this prisoner, was sworn?

A. That's right.

Q. And did you hear Mr. Burke say to this defendant, Clarence Lofton, "You have been told that anything you say may be used against you, and that you don't have to speak unless you want to. However, I'm going to give you the opportunity of speaking if you want to. You have just heard the story of Jasper Johnson. Anything you can add to that?"

And did this defendant say, "No, sir, I haven't anything to add to it"?

A. Yes.

Q. (reading) "Were you there when these events happened?"

Answer, "Yes, sir. He just about covered everything. I was there and was standing outside watching."

A. Yes.

Q. And then he was asked whether he corroborated what Jasper Johnson had said under oath, he also being under oath, before the magistrate, and did he answer, "That's right"?

A. That's right, sir.

MR. McCLAIN: I should like to submit the notes of testimony that were taken at the magistrate's hearing before Magistrate Williams on June 8th, 1946, in this matter. I suppose you will agree to the notes? They are signed by the stenographer.

MR. WALTON: No objection.

(The complete transcript of proceedings before the magistrate will be found copied at the end of the testimony in this case.)

CROSS-EXAMINATION.

BY MR. WALTON:

Q. Lieutenant Kelly, which one of these three men did you pick up first?

A. Clarence Lofton.

Q. And on the basis of what information did you pick up the other two?

A. Well, I would say that Clarence Lofton corroborated the information that I had originally, and due to that corroboration, why, I carried through with the investigation.

Q. Isn't it a fact that Clarence Lofton told you who had participated in this crime and gave you information on the basis of which you picked up the actual participants?

A. Well, Clarence Lofton, after—his participation with me, in cooperation with me, was that when the man—when the other men were apprehended, rather, Clarence Lofton did corroborate the fact they were the right men, coupled together with the information that we had beforehand, before he was even arrested, and thereafter was helpful to us in that he tried all that was humanly possible to make the other two tell the truth in the matter and to ask that they come in and cooperate and make a statement in the case.

Q. You did not arrest him on suspicion of this crime when he was first arrested?

A. He was arrested for something else.

Q. He was arrested for something else?

A. Yes.

Q. And you found out about this afterwards?

A. Yes.

Q. How long afterwards?

A. Well, Clarence was arrested, I believe, on the 24th of May. I would say probably around the latter part of May was—I would say around June 1st.

Q. He was arrested five months after this crime?

A. Beg pardon?

Q. He was arrested five months after this crime?

A. Yes, sir.

Q. Do you know whether he knew at that time that these two men were dead?

A. Pardon?

Q. Do you know whether he knew at that time that these two men were dead?

A. Well, they weren't dead at that time ——

Q. I mean at the time he was arrested, do you know whether he knew at the time he was arrested ——

A. I doubt it. I don't think Clarence is one that reads the papers—unless he might have been informed by either of the other two defendants. At the time of his arrest I think he did state that he didn't know that the men had died.

Q. In other words, so far as your information as to the actual occurrence down there goes, there was nothing to indicate that he had any reason for believing that there had been any assault in the broom factory, is that correct?

A. I won't go that far and say that. I mean, I don't know what went on in their minds or what their actual conversation was immediately afterwards.

Q. But as far as you know, he did not know they were dead at the time he was arrested?

A. That's right.

MR. WALTON: That is all.

RE-DIRECT EXAMINATION.

BY MR. McCLAIN:

Q. At the time of Lofton's arrest, and the subsequent arrests of Jasper Johnson and Aaron Turner, was your bureau investigating other murders in the city of Philadelphia?

A. Yes, sir.

Q. In which the police were interested to know whether or not this defendant and Jasper Johnson and Aaron Turner were participating? The other murders?

A. Yes, sir.

Q. And for that reason, to follow out the avenues of information and the statements that were given to you by this defendant and by the others, it was necessary to hold them for possibly five or six days; is that correct?

A. Yes, sir.

Q. And among these murders that were being investigated by your bureau was what is known as the murder of Mr. Kornfield by Ewell, Mumford and Smith?

A. Yes.

Q. And was it your information that these men were sort of a gang in South Philadelphia?

A. They were a gang that were committing the types of crime that prevailed in all of these cases; they all followed the same trend, and from the information I had, Clarence Lofton was part of that gang.

Q. And did he give you information that helped you to in some way solve the murder of Mr. Kornfield?

A. Yes, sir.

MR. McCLAIN: That is all.

RE-CROSS EXAMINATION

BY MR. WALTON:

Q. You did not have any information that he participated in the Kornfield murder in any way?

A. No, sir, I know definitely he did not.

Q. Who was the ringleader of this group of Turner, Johnson and Lofton?

A. This particular group was Aaron Turner.

Q. Turner was the master mind of the group?

A. The investigation showed that Aaron Turner was the dominant head of practically all of them, and this particular weapon that he used in this case was a constant companion to him. He was quite a gambler and quite a gambling cheat and he carried this what they describe as a sash weight at all times.

MR. McCLAIN: That is the Commonwealth's case, sirs.

THE COURT: Will the defendant testify?

MR. McCLAIN: Yes, I believe they are going to put him on.

JUDGE LEWIS: Put him on, Mr. Jones.

DEFENDANT'S EVIDENCE.

JUDGE LEWIS: I understand, gentlemen of counsel, that the defendant pleads guilty now and wants to tell the whole story of his participation?

MR. JONES: Yes, sir.

JUDGE LEWIS: Very well. Let him be sworn.

CLARENCE LOFTON, the defendant, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. WALTON:

Q. How old are you, Clarence?
A. 34.
Q. Where were you born?
A. New Orleans, Louisiana.
Q. When did you come up north?
A. Latter part of 1940.
Q. How much time did you spend in school, Clarence?
A. Not any.
Q. Not any? What did you do before you came north?
A. Always driving trucks, farm work.
Q. Where did you learn to drive a truck?
A. In Redbay, Florida.

BY JUDGE LEWIS:

Q. That is the sugar cane country?
A. Yes.

BY MR. WALTON:

Q. What did you do after you came up here?
A. I worked two years and six months in Maryland, in a powder plant.
Q. Where was that?
A. Elkton, Maryland.
Q. When did you come to Philadelphia?
A. During the time I was working in the powder plant, the end of June.

Q. The end of June of what year?

A. 1940.

Q. On December 15th, 1945, tell the court what happened between you and Aaron Turner.

A. I was in the saloon drinking at the time. He walked in and asked me, he wanted me to go somewhere with him.

BY JUDGE SLOANE:

Q. Who is "he"?

A. Turner. I was in there awhile and we walked out together.

BY MR. WALTON:

Q. Where were you?

A. 12th and South.

Q. In a saloon?

A. Yes. From there we went to 12th and Bainbridge. That was where he picked up Johnson.

Q. You went with him?

A. Yes. We came on back to South Street, went up South to 2nd, from 2nd on up to Callowhill. When we got to Market Street I asked him where he was going. I said, "Let's take a trolley." He said, "No, we ain't got much further to go now."

Q. What did he say about where you were going?

A. He didn't tell me definitely.

Q. Did he tell you what you were going for?

A. No, he just told me to come and go with him, he had a job to do.

Q. Had you gone with him before under his instructions?

A. No, sir.

Q. What happened after you got to 2nd and Market?

A. He told me we didn't have much further to go, and so we walked on. We got up to Callowhill Street. He told

me to watch outside, they would be out in a few minutes. So I waited outside and they come out.

Q. Outside of what?

A. Out of the building.

Q. What kind of building?

A. I didn't pay very much attention to it. It was a little small building. When Johnson come out, right behind him was Turner and I come out behind him.

Q. You weren't in the building?

A. No, sir.

Q. Did you know what went on inside?

A. No, sir, I didn't.

Q. Did you see them inside?

A. No, sir. From the position I was in I couldn't see inside.

BY JUDGE LEWIS:

Q. Where were you outside?

A. I was about as far from the building as from here to where you are sitting, as good as I can judge.

Q. About eight or ten feet from the building, on the sidewalk?

A. Yes.

Q. Were you in front of the place there where the broom factory was?

A. No, I wasn't in front of the building at all; I was that far from the building, at least.

Q. To the south or to the north?

A. Well, to the north.

Q. Up beyond the other part of the building?

A. Yes.

BY MR. WALTON:

Q. Towards Callowhill Street?

A. Yes.

Q. On the same side of the street?
A. Yes.

BY THE COURT (JUDGE LEWIS):

Q. What were you watching there for? For the police or something?
A. No, sir. They just told me to stand out there and watch for them.
Q. You were the watchman?
A. Yes.

BY MR. WALTON:

Q. What were you watching for? Officers?
A. They didn't tell me that. If anybody started in, to whistle for them.
Q. Anybody started in where?
A. Into the building.
Q. What time of the night or day was this?
A. I know I got—around five, five-thirty.

BY JUDGE LEWIS:

Q. Five or five-thirty on a December afternoon?
A. As near as I can guess.
Q. Was it daylight or dark?
A. It was dark—around dusk.

BY MR. WALTON:

Q. Were there lights on in the building?
A. I don't believe they were—yes, I believe they were I'm not sure.
Q. Did you look in through the windows after they went inside?

A. No, sir, I didn't get up to the building.

Q. Did you hear any noise while you were watching?

A. I didn't hear any noise.

Q. What did you see or hear while you were watching?

A. I didn't pay much attention to anything.

Q. What were you watching for?

A. In the meantime they told me to stand watch, if anybody started in to whistle.

Q. That is all you knew about what they were going to do?

A. Yes, sir.

Q. What did you talk to them about on the way up there?

A. They didn't tell me definitely. I didn't think I was going—they said they had a job to do where he could get some money. I didn't know they was going to participate in no murder or nothing.

Q. Was either Turner or Johnson armed, to your knowledge, during that walk?

A. The only thing, Turner had this paper. What was in it I didn't know personally.

Q. What kind of a piece of paper?

A. Piece of newspaper.

Q. What?

A. Newspaper.

Q. Flat or rolled up?

A. It was rolled up, but I didn't pay close attention to it, what was in it.

BY JUDGE SLOANE:

Q. Who had the newspaper?

A. Turner.

BY JUDGE LEWIS:

Q. Where did he carry it, Lofton?

A. He had it—he stuck it in his pocket when we left 12th and Bainbridge. What was in it I don't know.

Q. What pocket did he stick it in?

A. I think in his right front pocket.

Q. Right front pocket?

A. Yes.

Q. Do you mean down the side?

A. Yes.

BY MR. WALTON:

Q. How long were they inside while you were out watching?

A. As near as I can guess, fifteen or twenty minutes.

Q. What happened when they came out?

A. Johnson came out running, right behind him was Turner, and I struck up behind them.

Q. They were running?

A. Yes.

Q. Did you run with them?

A. Yes.

Q. Where did you run to?

A. We went on up to Callowhill Street.

Q. What happened?

A. We took off and went to walking.

Q. Tell the rest of the story.

A. That is all about ——

Q. Where did you walk to?

A. Went to 8th and Callowhill, went in there and bought some drinks. We left there and come back to South Philly, 12th and South. I left them there.

Q. You left them then?

A. Yes.

Q. Did you ever meet with them again after that?

A. No, sir.

Q. You went back to work the next week?

A. Yes, sir.

BY JUDGE LEWIS:

Q. Where did you work, Lofton?
A. I was working out at the Gulf oil refinery. Then I was put out of there and I worked at 112 Dock for Al Pollet.
Q. What did you do down there?
A. I was sorting and re-packing tomatoes.

BY MR. WALTON:

Q. Before you left them, did they tell you anything about what happened while they were inside?
A. Only thing they says, there was one lick passed—it was them talking, but I didn't figure there was any killing in it.
Q. What did they say, if you remember?
A. Something about several blows but I don't know what they was.

BY JUDGE LEWIS:

Q. Something about several blows?
A. About one terrible blow.
Q. One terrible blow?
A. Yes.

BY MR. WALTON:

Q. Did Turner have his rolled up newspaper with him when he came out?
A. I didn't pay much attention. I don't think he did.
Q. Did either of them have anything in their hands, as far as you noticed?
A. No.

BY JUDGE LEWIS:

Q. How much money did you get?
A. I had $87.
Q. Who gave you that $87?
A. Turner.
Q. Where were you when he gave it to you?
A. A little before we got to 8th and Callowhill.
Q. As you were walking along the street?
A. Yes.
Q. He divided up the money?
A. Yes.
Q. How much did Jasper Johnson get?
A. I don't know.

BY MR. WALTON:

Q. Do you know how much Turner himself had?
A. I don't know.

BY JUDGE SLOANE:

Q. While you were standing outside this broom factory, did you hear any noises inside?
A No, sir, I didn't hear nothing at all.
Q. Did they afterwards tell you what had happened, either one of them, Turner or Johnson?
A. No, sir; only thing they spoke about was about the blow.
Q. About a blow?
A. Yes.

BY MR. WALTON:

Q. When did you first learn that these two men were dead, Clarence?

A. After I got arrested.
Q. Who told you?
A. I think it was Lieutenant Kelly.
Q. That was in May?
A. Yes.
Q. Did you know before that that anyone had been injured or that there had been a fight?
A. No, sir, I did not.
Q. You did not have any conversation with Treetop or Johnson after you separated?
A. No, sir.
Q. Were you working all that time?
A. Yes, sir, I was.
Q. You were working when you were picked up?
A. Yes, sir.
Q. Are your parents living?
A. My father is living. My mother is dead.
Q. Where does your father live?
A. New Orleans.
Q. Does he know about this?
A. No, sir.

CROSS-EXAMINATION.

BY MR. McCLAIN:

Q. Lofton, on this day Aaron Turner told you he wanted to go some place to get some money, didn't he?
A. Yes, sir.
Q. How was he going to get the money?
A. He wasn't definite about how he was going to get it.
Q. Well, you saw him with the sash weight in his pocket, though, didn't you?
A. What was in the paper I don't know.
Q. You saw him wrap it up?
A. I said it was wrapped up. I don't know what was in it.

Q. What did you think you were standing outside for of the Ace Broom Company when they went inside? What were you going to do?

A. Nothing I was going to do. I wasn't going to do nothing.

Q. You were the look-out man?

A. Yes.

Q. If anybody went in, you were to whistle?

A. Yes, that was all.

Q. You knew they were going inside to do something?

A. Yes.

Q. And when they came out running, you knew they had done something?

A. Yes.

Q. So you ran with them?

A. Yes.

Q. Then they gave you $87?

A. Yes.

Q. You knew they had robbed the place, didn't you?

A. Yes, sir, but I didn't know there was no murder.

Q. You didn't know any murder was committed but you knew they had robbed?

A. Yes.

Q. And after you got down to the detective bureau after your arrest, you made a clean breast of everything, didn't you?

A. Yes, sir.

Q. You told the detectives the truth, didn't you?

A. Yes, sir.

Q. You signed your name to this statement, didn't you, after Detective O'Mahoney read it to you?

A. Yes, sir.

Q. It says on here, "The foregoing statement was read to me by Detective O'Mahony and it is true: I can sign my own name but that is all." And did you sign your name?

A. Yes.

Q. On each page of your statement?

A. Yes.

Q. You heard these statements that Aaron Turner and Jasper Johnson made, didn't you?

A. Yes.

Q. And you signed their statements?

A. Yes.

Q. When you made your statement you made it of your own free will, is not that right?

A. Yes.

Q. What is that?

A. That's right.

Q. Nobody forced you to make it?

A. No.

Q. When you went down before Magistrate Williams, it was in open court, just like this, wasn't it?

A. That's right.

Q. You were there and you heard Jasper Johnson tell what had happened?

A. That's right.

Q. And when they asked you—the district attorney, Mr. Burke, told you that you did not have to talk if you did not want to?

A. Yes.

Q. But you could if you wanted to, and anything you might say would be used against you? You remember that, don't you?

A. I remember.

Q. And notwithstanding that warning he gave you, you did talk?

A. That's right.

Q. You were sworn before the magistrate?

A. Yes, sir.

Q. And you told the magistrate in general that everything Jasper Johnson said was true?

A. That's right.

Q. Well, was everything Jasper Johnson said true at the magistrate's?

A. Yes, sir.

BY JUDGE LEWIS:

Q. So far as you know?
A. Yes.
Q. You weren't inside the building?
A. No, sir, I wasn't inside the building—so far as I know.

BY JUDGE SLOANE:

Q. When you were in the station house, what station house were you in?
A. 15th and Snyder.
Q. Was Turner with you?
A. No, sir.
Q. Was he in another station house?
A. Not at the time. When they got us together, that was here in City Hall.
Q. Well, did you sleep in the same cell with Turner?
A. No, sir.
Q. While you were in the City Hall here with Turner and Johnson, did the police do anything to Turner or Johnson?
A. Not that I know of, sir.
Q. You did not see anything?
A. No, sir.
Q. While they were with you?
A. No.
Q. They treated them properly, is that it?
A. As far as I know.
Q. As far as you saw, is that correct?
A. Yes.

BY MR. McCLAIN:

Q. Well, you said you made a voluntary statement. How were you treated?
A. I was treated decent.

MR. McCLAIN: That is all.

BY JUDGE LEWIS:

Q. Just a minute, Lofton. You have quite a bad record, haven't you?

A. Yes, sir.

Q. You have been arrested before for robbery, haven't you?

A. Yes, sir.

Q. You were on a burglary and robbery that took place at 714 Bainbridge—was it? Do you remember a case where you broke holes in the wall and went upstairs and took twenty dollars from a cash register and one hundred dollars from a cash box? Were you in that?

A. I was.

Q. That charge is still pending against you, isn't it, or has it been tried?

A. I haven't been tried.

Q. You have not been tried on that?

A. No.

Q. You were arrested in 1944 in Philadelphia for robbery by strong arm, a man named David Woolridge, 38th and Jackson, in the B. and O. barracks?

A. That's right.

Q. You pleaded guilty to that?

A. Yes.

Q. You were sent to the county prison for from one to three years by Judge Oliver. Do you remember that?

A. Yes.

Q. Then you served six months in 1943 for having a large knife in your possession?

A. Yes.

Q. You pleaded guilty to that?

A. Yes.

Q. Down in Louisiana you were arrested quite often, weren't you?

A. Yes, sir.

Q. Once for robbery, and sent to the state prison at Baton Rouge?

A. That's right.

Q. Then again for train riding and loitering. Material witness in a murder. Tell us about that. That was in 1940 at New Orleans. What kind of a case was that? Robbery?

A. No, sir.

Q. What was it, a fight among colored people?

A. A fight.

Q. Bridgeville, Delaware, you were in some trouble—disorderly conduct. In Wilmington you were twice arrested for driving other people's cars.

A. Well, I had their consent.

Q. You had consent?

A. Yes.

Q. Well, you got fifteen days on one and twenty-five dollars fine on the other, in 1943, didn't you?

A. Yes, sir.

Q. You were arrested in Wilmington for violation of the draft act and turned over to the Marines. Were you in the Marine Corps?

A. No, sir.

Q. That probably is U. S. Military. Were you in the Army?

A. No, sir.

Q. Why not?

A. I don't know, sir. I done lost my draft card then.

Q. You lost your draft card?

A. Yes.

Q. You were in one other robbery in Philadelphia last year—1313 South Street, a restaurant. Do you remember that?

A. Yes, sir.

Q. Were you on that robbery?

A. I was.

Q. You were with Sherman Whaley and Willie Lee Smith?

A. Yes.

Q. You took forty-five dollars from a man named Horace Lee, proprietor of the restaurant—you took forty-five dollars from the cash register?

A. Yes.

Q. Did you take it?

A. No, sir, Whaley got the money.

Q. Whaley got the money and divided it up?

A. Yes.

JUDGE LEWIS: You have a bad record. You would have been better off if you had been sentenced to a longer term than you got. Is there anything else?

BY JUDGE SLOANE:

Q. There is no doubt that Aaron Turner was the man, with Johnson, that went into that place. We want the full truth, now.

A. I gave it to you, all of it.

BY JUDGE LEWIS:

Q. Well, it is true that Turner and Johnson were up there, is it?

A. Yes.

Q. Turner is the man that had this weapon, so-called, in his pocket?

A. Yes.

Q. He was the man that came out and divided the money?

A. Yes.

Q. You are not lying about it?

A. No, sir.

MR. WALTON: If your Honors please, the issue obviously is not whether this man participated in this crime, but in mitigation I think it might be well to point out that it is clear that he had no idea that this crime was going to be different in character from those with which he was familiar, perhaps, as his record shows.

As Mr. McClain pointed out, he has a history of robberies and he was familiar with a group of men who were participating in robberies, but he has no record of having participated in robberies that resulted in killing, and there is nothing in this case to indicate he had any thought there would be any violence of that nature. He went on a Saturday afternoon into a neighborhood which is normally deserted, and it was as reasonable for him at the time to expect that these men were rifling a deserted establishment as it was to expect that it was defended by two men who would be assaulted in the course of the robbery, and there is no evidence whatever that he knew anything about the intention of Turner to kill, if killing became necessary, or even that he knew that a killing had occurred or that any assault of any kind had become necessary in the carrying out of the robbery, because even in the burglary of a deserted warehouse, for example, the men committing it get away as fast as possible after the burglary is completed, and there would be nothing in that circumstance, either, to indicate that he was charged or could be charged with any knowledge of the actual conditions of the assault.

So that while technically, and under I think the Doris case Mr. McClain relies on, the Supreme Court has said that the circumstance of being associated in a crime make all equally guilty, I think that there is a distinction, in that in that case all of those men were equally ready to commit a killing, and the fact that one of them was in the hands of the police—which perhaps was the thing which prevented him also from killing the bank guard ——

JUDGE LEWIS: That was the Olney Bank robbery case?

MR. McCLAIN: Yes, sir.

JUDGE LEWIS: Were all the conspirators in the Olney Bank case armed—separately armed? That I do not remember.

MR. McCLAIN: That I do not remember, your Honor. I know that the policeman who was killed in that case was on a milk truck chasing other of the bandits than Doris, because at the time of the death of this policeman, Doris had been in custody for twenty minutes and was approximately three miles away from the scene of the killing.

JUDGE LEWIS: Well, in a case that I had, where a Corn Exchange Bank messenger was shot and killed by one of three bandits subsequently electrocuted, the others pleaded guilty, and one got away and was subsequently killed up in Canada in a robbery. I sentenced one of them, Maloney, to twenty years because he confessed in that case and helped the police and he did not fire the shot, but he was in a car ready to drive them away. I gave him twenty years and he was released not long ago. The man who fired the shot was electrocuted. His name was Martin.

MR. McCLAIN: In this case, while legally there is absolutely no difference between Lofton on the one hand and Johnson and Turner on the other, there is a slight moral difference that may sway your Honors to feel that the lesser penalty is the proper one.

JUDGE LEWIS: You mean life imprisonment?

MR. McCLAIN: Yes. In view of the fact that Lieutenant Kelly tells me that Lofton has been of material aid in

the solving of other murders that the police could not have solved if it had not been for this aid, and the recommendation of our office, sirs, would be that the lesser penalty be imposed.

JUDGE LEWIS: Well, he might well be sentenced to be electrocuted on his record, plus this crime. There are several acts of robbery, but as far as the record shows, he never had a gun.

MR. McCLAIN: We have nothing to show that he was armed at all on this day. We do not know whether he was. He says he was not. If there had been any revolver or pistol in the hands of Johnson or T. ner, they would probably have used it. But Turner used this sash-weight to kill these two men and Johnson robbed one of them after the man was lying on the floor in a pool of blood.

JUDGE LEWIS: Well, Judge Sloane is familiar with the entire transaction.

JUDGE SLOANE: I suppose your argument is, as far as the definition of the crime, that it is murder of the first degree, and your argument goes only to the question of penalty?

MR. WALTON: Yes, your Honor, it is a question of the penalty.

JUDGE SLOANE: And you are addressing the argument that that is the recommendation made to the court by the district attorney?

MR. WALTON: And also on the question of mitigation. While he had reason to suspect that these men were going to commit a crime, there is nothing to indicate that he had

actual knowledge of that. Of course, we can assume that he was entitled to infer that there was a crime to be committed, but there is some distinction, I think your Honors will agree, between expecting the crime of burglary and the crime of murder to be committed, and the extent of his participation would be determined upon the extent of his knowledge—not what was in store for him or for the alleged conspiracy.

JUDGE LEWIS: As a matter of fact, these murders were entirely unnecessary, as far as any human being can see. All these brutes had to do was to knock the men down or stun them or something, but this big, brutal Treetop, who was in the office with this weapon and battered the skulls of the two men, was utterly without any reason.

MR. JONES: Not only that, but even if they had reported in some way to someone that two men had been injured, they probably could have been saved.

JUDGE LEWIS: I doubt if they could have been saved, because one man's head was so battered that his brains were protruding, according to the testimony in the Johnson case.

MR. JONES: But they lived for two or three days.

MR. McCLAIN: Endres lived for two days and Simmons lived for six days.

MR. WALTON: I understand they were taken to the hospital reasonably promptly, within an hour.

MR. McCLAIN: Murder committed in the perpetration of a robbery, even in the case of an accidental death, makes them liable to first degree.

JUDGE LEWIS: Oh, he might very well be sentenced to the electric chair, which was the jury's verdict in the Johnson case. It is just a question of whether under the circumstance that he did not enter the premises, he ought to be let off with life imprisonment. This case convinces me, Judge Sloane, that there ought to be more indictments of men with records such as this as habitual criminals. There ought to be a more serious penalty. A man who is an habitual criminal ought to be indicted as such and put away for life. A man who commits two or three robberies by strong arm ought to be put away for life. He ought never be allowed out of prison. He should be indicted as an habitual criminal with a penalty of say twenty to forty years and then we could get rid of some of these robbers who make a practice of it. Sooner or later a good many of them commit murder.

(The hearing was thereupon adjourned and the matter taken under advisement by the court.)

COMMONWEALTH'S EXHIBIT.

(The following is a copy of the transcript of testimony taken at the magistrate's hearing, referred to in the foregoing proceedings:)

IN THE
MAGISTRATES' COURTS OF PHILADELPHIA.

CENTRAL POLICE COURT.
(City Hall.)

COMMONWEALTH
v.
CLARENCE LOFTON, JASPER JOHNSON, AARON TURNER.

Homicide; Robbery; Burglary; Conspiracy to Commit Felony.

Philadelphia, Pa., June 8, 1946.

Before: HON. EDWARD WILLIAMS, Magistrate.

PRESENT:
D. BARLOW BURKE, Esq., A. D. A., for the Commonwealth.

Commonwealth's Exhibit

LIEUTENANT JAMES KELLY, sworn:

BY MR. BURKE:

Q. Lieutenant Kelly, did you make the investigation in the case of these three men?

A. I did.

Q. Proceed, please.

A. On December 15, 1945, at 355 North 2nd Street, at the Ace Broom Factory, an assault took place at about 4.45 in the afternoon, and as a result of the assault two persons died, one known as Charles Simmons and the other known as Frank Enders. Enders was 62 years of age and Simmons was 52 years of age. As a result of the investigation at that time, it was determined that in addition to the homicide, there was also a robbery involved, the amount of money taken we were unable to determine. So, as a result of a further investigation, these three defendants were arrested. Clarence Lofton, the No. 1 man, Jasper Johnson, the No. 2 man, and Aaron Turner, the No. 3 man. These men have made statements to the police, setting forth the part each one took in this particular case.

Q. Does each one admit in his signed statement that he was involved in the homicide?

A. They do, sir.

Q. Are the statements here, Lieutenant?

A. No, sir.

Q. Any further testimony from an officer?

A. No, sir.

MR. BURKE: Do any of you men want to say anything this morning? I want to warn you in advance that anything you say may be used against you in Court, and that you don't have to say anything if you don't want to. I understand, however, that you have made statements to the officers and signed those statements. Jasper Johnson, you have made a signed statement to the officers?

JASPER JOHNSON: Yes, sir.

MR. BURKE: Do you want to say anything this morning?

JASPER JOHNSON: Yes, sir.

JASPER JOHNSON, Co-Defendant, sworn.

BY MR. BURKE:

Q. Now, what's your name?
A. Jasper Johnson.
Q. Are you also known as "James Johnson," "Fats" and "Playboy"?
A. Yes, sir.
Q. What is your residence?
A. 620 South 13th Street.
Q. You have heard the testimony of Lieutenant Kelly before his Honor this morning?
A. Yes, sir.
Q. Do you want to add anything to that?
A. Yes, sir.
Q. Were you connected with the activities that Lieutenant Kelly testified to?
A. Yes, sir.
Q. Were you involved in the homicide of Charles Simmons and Frank Enders?
A. Yes, sir.
Q. What part did you play in that?
A. December 15th, at 12th and Bainbridge, Aaron Turner and Clarence Lofton came to 12th and Bainbridge and got me. "Treetop" said to me ——
Q. Who is "Treetop"?

A. Aaron Turner—said to me: "Come on, Fats, and go with me. I'm going to get some money." I said to Treetop, I said: "I don't mind going, but I don't want no trouble." He said: "There were no trouble. Come on." We goes to 12th and South from 12th and Bainbridge, and stopped between 5th and 6th at a hot-dog stand and gets a couple of sandwiches apiece. We leave there. We goes to 2nd Street. We goes to start, and I had been drinking and was beginning to get sick. So, Clarence said: "Treetop, if its much further, we'll catch a trolley." Treetop said: "We don't have much more to go, so we'll walk on down." So, we walked to 2nd and Callowhill. Treetop says to Clarence: "You wait on the highway." Treetop and I goes in the first door together. We goes in the first door together and gets on the inside. Treetop had a package in his pocket, and a pipe wrapped up in newspaper.

Q. A package? What kind of a package?

A. A piece of sash-weight wrapped up in paper, about eight inches long and about that round (indicating about one inch). We gets to the first door. Treetop gets ahead.

Q. Did you follow him in?

A. I follow him in. He gets one of the guys. The smallest guy he slugs. I don't know how many times he slugged him.

Q. Did you see that?

A. Yes, sir. After Treetop slugs him, I gets in his pocket and gets his wallet. I was trying to get it out of his hip pocket. I slings the wallet in the building, where I don't know. So, when I looks around, Treetop and this other guy is tusseling.

Q. You saw him tusseling with another man?

A. Another white man. So, after I got through mine, I looks around and said: "Let's go." So, I leave out running. Treetop follows.

Q. You mean you left the place?

A. I left running. Treetop follows. After Clarence sees us running, Clarence follows us.

Q. What was Lofton doing?

A. He was the watchout man. He never entered the building. So, we goes on down the street. We get near 8th and Callowhill, somewhere close by, I look at the money, I don't know exactly how much, it looks like $175.00.

Q. You testified before that you threw the wallet away?

A. I takes the money out before I threw it away. So, I takes $50.00. I hand the other to Treetop. Treetop gave Clarence some money. I don't know how much. So, after Treetop gives Clarence the money ——

Q. Did you see him give Clarence the money?

A. I saw him, but I don't know how much. I says to Treetop: "How much—what did you get off the other fellow?" He says: "Nothing." We goes to 8th and Callowhill and gets a couple of large drinks. Treetop goes in the bathroom and comes out. We catch an 8th Street trolley and go back downtown to 12th and South. We get a couple of drinks in there and goes from 12th and South to 12th and Bainbridge, where I met him, and get a couple more drinks and splits up there.

Q. Up until then you had been together?

A. That's right. The next what was said, Treetop said to me and Clarence: "Anybody gets arrested, you don't know me and I don't know you."

Q. Who said that?

A. Aaron Turner—"Treetop."

Q. Then what happened?

A. That's all. We split up.

Q. How about this second man in the room?

A. Treetop had him.

Q. What was he doing to him?

A. When I looked around, him and Treetop was tusseling.

Q. Did you see Treetop slug him?

A. I saw some blood.

Q. Did Treetop still have this object in his hand?

A. I'm not sure whether he had that sash-weight at that time or not.

Q. Did you see Treetop slug him, the second man?
A. That's right.
Q. Was the first man on the floor at the time?
A. Yes, sir, he was on the floor, and I was trying to get in his pocket.
Q. Was he lying on the floor when you three left?
A. Yes, sir.
Q. Anything else you can add?
A. No, sir.

CLARENCE LOFTON, Co-Defendant, sworn.

BY MR. BURKE:

Q. You've been told that everything you say may be used against you, and that you don't have to speak unless you want to. However, I'm going to give you the opportunity of speaking if you want to. You have just heard the story of Jasper Johnson. Anything you can add to that?
A. No, sir, I haven't anything to add to it.
Q. Were you there when these events happened?
A. Yes, sir. He just about covered everything. I was there, and was standing outside watching.
Q. You corroborate what he has said?
A. That's right.

AARON TURNER, Co-Defendant, sworn.

BY MR. BURKE:

Q. Do you want to say anything to His Honor?
A. No, sir.

Q. Can you add anything?
A. No, sir.
Q. You don't want to add anything. Do you agree with the testimony that these two men have given in Court?
A. Yes, sir.
Q. You corroborate their testimony?
A. Yes, sir.
Q. You say that it's true?
A. Yes, sir.
Q. You're not denying anything that they said?
A. No, sir.
Q. How much money did you get in this?
A. I don't know.
Q. About how much?
A. I would say $175.00.
Q. Did you divide up with the others? Was that $175.00 that which you, yourself, got out of the thing?
A. Yes, sir.
Q. Was that in addition to the $50.00 that one got and the $175.00 the other got?
A. No, sir.
Q. That's your share?
A. Yes, sir.
Q. You got $175.00 yourself?
A. Yes, sir.

CLARENCE LOFTON (recalled).

BY MR. BURKE:

Q. Will you tell his Honor how much you got out of this?
A. About $87.00 is what he gave me.
Q. That was given to you by "Treetop" Turner?
A. That's right.

Commonwealth's Exhibit

JASPER JOHNSON (recalled):

BY MR. BURKE:

Q. How much did you get?
A. $50.00.
Q. How much was in the wallet?
A. I estimated about $175.00. I wasn't sure.
Q. Whom did you get that from?
A. The first white fellow in the building he slugged. I passed it to Treetop.

MR. BURKE: Your Honor, I think a prima facie case of homicide, burglarly and robbery has been established against these three defendants, and I'm going to ask that you hold all three without bail for the action of the Grand Jury.

LIEUTENANT KELLY: I might add that there has been a Coroner's inquest in this matter, at which time the finding was that the deaths resulted at the hands of a person or persons unknown.

MR. BURKE: I think, your Honor, that these members of the Detective Division are to be commended for a very fine piece of detective work in cleaning up this mysterious murder. They ought to be commended for it, and I would like to go on record as saying it.

THE COURT: I think the same way. Without bail for Court.

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the hearing of the above cause, and that this is a correct transcript of the same.

(Sgd.) DAVID F. HOULIHAN, JR.,
Stenographer.

Discussion Between Lewis, J. and Defendant, Clarence Lofton

IN THE
COURT OF OYER AND TERMINER.
FOR THE COUNTY OF PHILADELPHIA, PENNSYLVANIA.

COMMONWEALTH,
v.
CLARENCE LOFTON.

June Sessions, 1946.
No. 646.
Charge: Murder.

Room 453, City Hall, Philadelphia, February 19, 1947.

HON. EDWIN O. LEWIS, J., Presiding.

PRESENT:
COLBERT C. McCLAIN, Esq., Assistant District Attorney, for the Commonwealth.
W. WYCLIF WALTON, Esq., for the Defendant.

THE COURT: Lofton, the three judges who heard your plea of guilty are agreed in adjudging you guilty of the degree that you should be adjudged, which is murder of the first degree, and accordingly I pronounce that judgment.

Having affixed the degree of your offense as murder of the first degree, it then followed that the punishment should

be agreed upon. The two judges who very kindly agreed to sit with me to dispose of the matter have likewise agreed with me that your punishment should be imprisonment for life, and accordingly fixed that punishment, sentencing you to imprisonment in the Eastern Penitentiary for life.

Now, is there anything you want to add to the record?

MR. WALTON: I have nothing, but may the defendant make a statement?

THE COURT: Yes.

THE DEFENDANT: I am very sorry I took a walk with them. I didn't know that there was to be any murder involved. Howsoever, I am very sorry it happened. If I knew it was going to happen, I wouldn't have been in with them. If I had known it, I would have given up my life to replace the ones that have been taken.

(Defendant adjudged guilty of murder of the first degree and sentenced to imprisonment for life in the Eastern Penitentiary.)